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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR, ETC.,
PETITIONER,

vs.

STEWART L. UDALL,
SECRETARY OF THE INTERIOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1962
CERTIORARI GRANTED NOVEMBER 5, 1962

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Appellant,

v.

STEWART L. UDALL, Secretary of the Interior,
Appellee

Appeal from the United States District Court for the District of Columbia

---

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Plaintiff

vs.

FRED A. SEATON, Secretary of the Interior, United States Department of the Interior,
Defendant

Civil No. 2463-59

RELEVANT DOCKET ENTRIES

1959

Sept. 4—Complaint, Appearance, Exhibits 1, 2 & 3.

Oct. 13—Answer of deft to complt.

1960

Sept. 16—Motion of deft for summary judgment, P. & A.

Sept. 16—Statement of deft of Material facts.

Oct. 20—Motion of pltff for summary judgment, P. & A.

Oct. 28—Opposition of deft. to pltf's motion for summary judgment.

Nov. 23—Findings of fact and conclusions of law.
Judgment granting deft's motion for summary judgment; denying pltf's cross-motion for summary judgment and entering judgment for deft vs pltf and dismissing complaint.

1961

Jan. 19—Notice of Appeal by pltf. Deposit by Hoffman $5.00

Feb. 10—Consent order substituting Stewart L. Udall as deft in place of Fred A. Seaton.

(Complaint and exhibits all filed September 4, 1959)

• • • •

COMPLAINT

FOR REVIEW, FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

The Plaintiff for his complaint represents as follows:

1. That the Plaintiff is a citizen of the United States and is the Administrator of the Estate of F.W.C. Boesche, deceased, duly appointed and qualified under the laws of the State of Oklahoma.

2. That the Defendant is the Secretary of the Interior of the United States, and as such is charged with the administration of the laws governing public domain lands of the United States, including the Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. Sec. 181, *et seq.* The official residence of the Defendant is the District of Columbia.

3. That the matter in controversy, exclusive of interests and costs is in excess of $3,000.00.

4. That the jurisdiction of this court is invoked under Title II, Section 306 of the District Code, and upon the further ground that the application, construction and interpretation of the Federal Constitution and Federal statutes are involved and required. Plaintiff seeks relief under provisions of Section 10 of the Administrative Procedures Act, and under the terms of Title 28, U.S.C., Secs. 2201, 2202, relating to Declaratory Judgments. The court also has jurisdiction by virtue of its inherent power to grant injunctive relief in the premises.

5. That the Plaintiff brings this suit to protect the interests of the Estate of F. W. C. Boesche, deceased, in noncompetitive oil and gas lease bearing serial number

New Mexico 027951 and hereinafter referred to as the Boesche lease. The heirs at law in said estate are Elizabeth M. Boesche, widow; Maxine B. McCorkle, daughter; Adele R. Boesche, daughter; David M. Boesche, son; and Fenelon Boesche, son. Said lease was issued under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, as amended, 30 U.S.C. 226) for lands in the public domain of the United States situated in the state of Oklahoma, more particularly described as follows:

Indian Meridian, Oklahoma, T. 22 N., R. 16 W.,
Sec. 21, W½NW¼, containing 80 acres

6. That this case involves defendant's arbitrary, capricious and unlawful action in holding for cancellation of oil and gas lease New Mexico 027951 issued to F. W. C. Boesche, November 15, 1957, for an alleged violation of a Departmental regulation, 43 CFR 192.42(d), which provides that a lease may not be issued for less than 640 acres except when the land is surrounded by land not available for leasing.

7. That Lease New Mexico 027951 was issued to F. W. C. Boesche, who was the first qualified applicant therefor, November 15, 1957, effective December 1, 1957, pursuant to a lease offer filed in the United States Land Office at Santa Fe, New Mexico on or about September 11, 1956, and that the official records of the Interior Department show that the following events have occurred in connection with said lease:

(a) That a junior lease offer filed on or about September 11, 1956 by Vincent Cuccia and George E. Conley for the same land as that included in the Boesche lease offer, together with an adjoining tract, which offer was assigned serial number New Mexico 027952, was rejected by the Manager of the Local Land Office in a decision dated January 24, 1958. A copy of the decision is attached hereto as Exhibit 1 and made a part hereof.

(b) That Cuccia and Conley filed an appeal from said decision of the Manager dated January 24, 1958, and in a decision dated January 9, 1959, the Director of the Bureau of Land Management reversed the Manager's decision, and the Boesche lease, New Mexico 027951, was held for cancellation. A copy of this decision is attached hereto as Exhibit 2 and made a part hereof.

(c) That prior to his death on July 12, 1959, F.W.C. Boesche filed an appeal from the January 9, 1958 decision of the Director and on August 5, 1959, A-27997, the Deputy Solicitor of the Interior Department acting under delegated authority from the Secretary of the Interior affirmed the order of cancellation. A copy of the decision is attached hereto as Exhibit 3 and made a part hereof.

(d) That under the Rules of Practice of the Department of the Interior, Title 43 Code of Federal Regulations, Part 221, the administrative remedies available to the Plaintiff have been exhausted.

8. That lease New Mexico 027951 was issued to a qualified applicant under authority of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. Sec. 181, *et seq.* and the provisions in that law authorizing cancellation of a lease are limited. In 30 U.S.C. 188 it is set forth that any lease issued under the Mineral Leasing Act after August 21, 1935, may be cancelled by the Secretary only upon failure of the lessee to comply with any of the provisions of the lease. There has been no violation of any of the terms of the Boesche lease. The Secretary of the Interior has no authority to administratively cancel any public domain oil and gas lease which has been validly issued. In view of this lack of authority, the Secretary's attempt to cancel was arbitrary, capricious and unlawful.

9. That under Departmental regulation 43 CFR 192.42 (d) a lease offer may not be for less than 640 acres, except

where the land is surrounded by land not available for leasing. The land included in the Boesche lease was within the meaning of this exception. The only public domain land contiguous to lease New Mexico 027951 was the NW¼SW¼ Section 21, T. 22 N., R. 16 W., Ind. M., which was then included in a prior oil and gas lease offer New Mexico 018806, filed April 14, 1955, and for which a lease was issued effective December 1, 1956, one year prior to the date the Boesche lease was effective. The Interior Department concedes that where a lease is issued on the basis of an offer filed in violation of this regulation, there is no requirement of law that the lease be canceled.

10. That on the date the Boesche lease offer was filed, the NW¼SW¼ section 21, T. 22 N., R. 16 W., Ind. M., was included in a valid subsisting lease offer for which a lease was issued long before the Boesche lease was issued. The land was not subject to inclusion in a lease based on any offer that might have been filed by Boesche on the date his lease offer was filed or at any subsequent date.

That therefore the Boesche application met the Departmental regulation 43 CFR 192.42(d), as the adjoining 40 acres of land was embraced in the prior valid application New Mexico 018806 for which a lease was duly issued. Inclusion thereof in the Boesche lease offer would have been a useless act serving no valid purpose.

11. That even if it is conceded for the purposes of this argument that 43 CFR 192.42(d) was not complied with, no cancellation action would lie, as the Land Office Manager as the Secretary's delegate has the power to waive, and did waive any regulatory defect in an application upon his issuance of the oil and gas lease.

12. That the regulations in 43 CFR 192.42(d) as applied to the circumstances here involved deprive the

appellant of a vested right and constitute an attempt on the part of the Secretary of the Interior to exercise powers beyond the scope of his delegated powers. Such action is a usurpation of legislative authority and is ineffective. His power to prescribe rules and regulations to carry out the intent and purpose of the law is not the power to make law. His regulations may not expand or extend the provisions of the statute or add to the conditions of a right a condition not stated in the law. A regulation which is inconsistent with the provisions of a statute is void. See 8 F. Supp. 315; affirmed 185 F. 2nd 781; reversed in part (not related to above) 71 S. Ct. 684, 341 U.S. 321, 95 L. Ed. 968. See also *United States* v. *United Verde Copper Company*, 196 U.S. 207, wherein the court held:

> "But there is amore absolutely fatal objection to the regulation (Rule 7). (*Viz.* Rule 7 which provides no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.) The Secretary of the Interior attempts by it to give authoritative and final construction of the Statute. This, we think, is beyond his power . . . If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. Such power is not regulation; it is legislation."

13. That the Defendant be restrained *pendente lite* from cancelling oil and gas lease New Mexico 027951 and from issuing oil and gas lease New Mexico 027952 in order to preserve the status quo of these cases pending determination of this law suit. The Plaintiff alleges on information and belief that neither of such actions has as yet been taken, and that the restraining order is necessary to prevent the taking of any such action which might be seriously detrimental and damaging to the Plaintiff in that it might result in possible loss of jurisdiction of this court to adjudicate the issued involved herein.

WHEREFORE, Plaintiff prays:

1. That Defendant be restrained and enjoined, *pendente lite* from cancelling oil and gas lease New Mexico 027951,

2. That Defendant be restrained from issuing oil and gas lease New Mexico 027952,

3. That the court review the action of the Defendant in accordance with the provisions of the Administrative Procedures Act (5 U.S.C. 1009).

4. That it be declared and adjudged that no authority exists for cancellation of oil and gas lease New Mexico 027951, for failure of the original lease offer to include a contiguous parcel of land for which a valid lease offer was filed, and which has since been included in oil and gas lease New Mexico 018806,

5. That the Defendant pay to Plaintiff the costs of this action,

6. That Plaintiff have such other and further relief as is just and equitable.

LEWIS E. HOFFMAN
800 Sheraton Building
711 - 14th Street, N.W.
Washington 5, D. C.
Tel: DIstrict 7-9840

JOHN F. DEEDS
311 Western Union Building
1405 G Street, N.W.
Washington 5, D. C.
Tel: Metropolitan 8-1647

DISTRICT OF COLUMBIA: SS

Lewis E. Hoffman, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein, that the plaintiff is a resident of Tulsa, Oklahoma, and is absent from the District of Columbia, that affiant read the foregoing complaint by him subscribed and that he knows the contents thereof and that the matters and things therein stated he verily believes to be true.

/s/ Lewis E. Hoffman

Subscribed and sworn to before me this 3rd day of September 1959.

/s/ Eleanor M. Haight
Notary Public

(SEAL)

EXHIBIT NO. 1

NM 027952(Okla)
Oil and Gas
4.10f

Land Office
P. O. Box 1251
Sante Fe, New Mexico

January 24, 1958

Certified Mail
Return Receipt Requested

DECISION

OIL AND GAS

VINCENT CUCCIA and GEORGE E. CONLEY

Offer To Lease Rejected

Offer to lease NM 027952 (Okla) is hereby rejected in its entirety for the following reasons:

> All of the lands involved in this offer are included in oil and gas lease NM 027951 (Okla) which issued effective December 1, 1957 following an application filed on September 11, 1956 at 10:01 a.m. NM 027952 (Okla) filed on September 11, 1956 at 10:20 a.m.

The right to appeal to the Director, Bureau of Land Management is allowed in accordance with information in the attached form 4-1366 made a part hereof, and the regulations contained in form 4-1364, a copy of which is also attached.

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES
Manager

Attachments
REMartinez:mam

EXHIBIT NO. 2

Cancellation

SYLLABUS

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored, and where a lease has been issued in derogation of that statutory preference right, that lease will be cancelled.

Vincent Cuccia et al., New Mexico 027952 and 027951 (January 9, 1959)

EXHIBIT NO. 2

In reply refer to:
New Mexico 027952
027951
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 9, 1959

Certified Mail
Return Receipt Requested

DECISION

OIL AND GAS

VINCENT CUCCIA and GEORGE E. CONLEY,
Appellants

F.W.C. BOESCHE

Manager's Decision Reversed

Messrs. Cuccia and Conley have appealed to the Director from a decision of the Manager, Land Office, Santa

Fe, New Mexico, dated January 24, 1958, rejecting their noncompetitive oil and gas lease offer, New Mexico 027952, filed under sec. 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 226). The offer was rejected for the reason that it conflicted with issued lease New Mexico 027951 (effective December 1, 1957), issued to F. W. C. Boesche, pursuant to offer filed September 11, 1956.

The appellants filed their lease offer on September 11, 1956. They show that the offer, pursuant to which the lease was issued to Boesche was not a proper offer under 43 CFR 192.42(d) because the offer was for less than 640 acres and not within the exceptions provided in that regulation. They contend, since their offer was the first proper offer for the lands described, that the Boesche lease should be cancelled and that a lease for the lands described in their offer should be issued to them.

Lease offer, New Mexico 027951, when filed, described less than 640 acres and did not comply with the pertinent regulation, 43 CFR 192.42(d). The offer when filed, should have been rejected. *Natalie Z. Shell,* 62 I.D. 417 (1955).

The appellants, being the first to file a proper lease offer for the lands involved, and being otherwise qualified, acquired a statutory preference right to a lease, if a lease for the lands was to be issued, which must be honored. 30 U.S.C., sec. 226; *C. T. Hegwer et al.,* 62 I.D. 77, 80 (1955). It follows that lease New Mexico 027951 was issued in contravention of law and in derogation of the rights of the appellants. Therefore, lease New Mexico 027951 is held for cancellation.

Mr. Boesche is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations. In the absence of an

appeal the lease will be cancelled without further notice to Mr. Boesche.

When this decision becomes final the case record will be returned, through the Bureau's State Supervisor at Santa Fe, New Mexico, for further processing of the appellants' application, and for issuance of a lease pursuant thereto, all else being regular.

If an appeal is taken by Mr. Boesche, then the adverse parties to be served are:

George E. Conley
Vincent Cuccia
Post Office Box 247
Ontario, California

/s/ Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. F. W. C. Boesche (Certified Mail)
Messrs. George E. Conley and Vincent Cuccia
(Regular Mail)

Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1

WJ
47754

EXHIBIT NO. 3

57705-59

SYLLABUS

F. W. C. BOESCHE

A-27997 Decided Aug. 5, 1959

Oil and Gas Lease: Applications—Oil and Gas Leases: Cancellation

An oil and gas lease is properly held for cancellation where it was issued pursuant to an application for less than 640 acres which did not include adjoining lands available for leasing at the time when the application was filed, as required by regulation, and where a subsequent, acceptable application was pending when the lease was issued.

EXHIBIT NO. 3

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington 25, D. C.

New Mexico 027951

Oil and gas lease held for cancellation.

Affirmed.

A-27997

F. W. C. BOESCHE

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

F. W. C. Boesche has appealed to the Secretary of the Interior from a decision of January 9, 1959, by the Direc-

tor of the Bureau of Land Management which held for cancellation the appellant's oil and gas lease New Mexico 027951 issued as of November 15, 1957, on 80 acres of land described as the W½NW¼ sec. 21, T. 22 N., R. 16 W., Indian Meridian, Oklahoma. The Director's decision held that the appellant's lease offer was defective and that the issuance of the lease did not accord with section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

The appellant's application for lease was filed on September 11, 1956, on which date a 40-acre tract (the NW¼ SW¼ sec. 21, T. 22 N., R. 16 W., Indian Meridian) which adjoins, on the south, the 80 acres in the appellant's lease, was included in oil and gas offer New Mexico 018806, filed on April 14, 1955, by Thomas Connell. A lease was issued to Connell effective December 1, 1956, on this 40-acre tract.

On September 21, 1956, Vincent Cuccia and George E. Conley filed oil and gas lease offer New Mexico 027952 for the 80 acres now covered by the appellant's lease and also the above-described 40-acre tract now leased to Connell. On January 15, 1957, Cuccia and Conley withdrew their application as to the 40-acre tract leased to Connell effective December 1, 1956. By decision of January 24, 1958, the manager of the Santa Fe land office rejected the application of Cuccia and Conley on the ground that all of the land for which they applied was leased to the appellant. The Director's decision in this proceeding reversed the manager's decision of January 24, 1958.

By departmental regulation (43 CFR 192.42(d) and 43 CFR, 1958 Supp., 192.42(d)) an offer for a noncompetitive lease must include an area of not less than 640 acres except upon a showing that the land applied for is in an approved unit plan, or where the land is surrounded by

lands which are not available for leasing.[1] An offer to lease for less than 640 acres which is not within one of these exceptions must be rejected and affords the applicant no priority (43 CFR 192.42 (g)(1)).

In a number of decisions the Department has held that lands are available for leasing within the meaning of 43 CFR 192.42(d) even though they are covered by an outstanding oil and gas lease application (*Natalie Z. Shell*, supra, fn. 1; *R. S. Prows*, 66 I.D. 19 (1959); *Frank Perew, Jr., et al.*, A-27915 (May 19, 1959)). Accordingly, the above-described NW¼SW¼ sec. 21 should have been included in the appellant's offer to lease, and as it was not, the offer should have been rejected (*Frank Perew, Jr., et al., supra; R. S. Prows, supra*). The Department has also held that an oil and gas lease which is issued pursuant to an application for less than 640 acres which did not include adjoining lands available for leasing when the application was filed must be canceled where a subsequent, acceptable application was pending when the lease was issued (*R. S. Prows, supra*).

None of the matters asserted on appeal provides a basis for distinguishing the instant case from the cited decisions. The appellant's assertion that there is no requirement that a lease be canceled by reason of an administrative error is not well taken. Section 17 of the Mineral Leasing Act, as amended, requires that if a noncompetitive oil and gas lease is issued, it must be issued to the first qualified applicant therefor. The provision grants a statutory preference right to the first qualified applicant and a lease issued in violation thereof contravenes the statute and departmental regulations referred to above and must be canceled. (*R. S. Prows, supra*, and cases cited therein).

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[1] A third exception is where the equivalent of the rule of approximation applies. *Natalie Z. Shell*, 62 I.D. 417 (1955).

Accordingly, the decision holding the appellant's lease for cancellation and directing issuance of a lease on the land to the first qualified applicant for a lease was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

(Sgd) Edmund T. Fritz
Deputy Solicitor

(Filed October 13, 1959)

• • • •

ANSWER

The defendant by his attorney, Thos. L. McKevitt, Attorney, Department of Justice, for his answer says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The applicants Vincent Cuccia and George E. Conley, who the defendant has determined are entitled to a lease (New Mexico 027956), are indispensable parties.

Third Defense

I

Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in paragraph 1.

II

Defendant admits the allegations in paragraph 2.

III

Defendant admits the allegations in paragraph 3.

IV

Defendant says that the allegations in paragraph 4 are conclusions of law.

V

Defendant is without information sufficient to form a belief as to the truth or falsity of the allegations in the first two sentences in paragraph 5. Defendant admits the allegations in the last sentence in that paragraph.

VI

Defendant denies the allegations in paragraph 6.

VII

With respect to paragraph 7, defendant admits that lease New Mexico 027951 was issued to F.W.C. Boesche as of November 15, 1957, but denies that F.W.C. Boesche was the first qualified applicant. At the time F.W.C. Boesche applied for his lease on September 11, 1956, he failed to comply with the applicable regulation set out in 43 C.F.R. 192.42(d) which provides that an application to lease public lands must be for not less than 640 acres, except where the land is surrounded by lands not available under the act. The Boesche lease application covered the 80 acres of land described in paragraph 5 of the complaint but failed to include a contiguous 40-acre tract which at the time the application was filed was available for leasing, although included in an earlier filed application to lease. Defendant admits the remaining allegations in paragraph 7.

VIII

Defendant denies the allegations in paragraph 8, except the allegation that lease New Mexico 027951 was purportedly issued pursuant to the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended. The provisions of 30 U.S.C. 188 permit the Secretary to cancel a nonproducing lease for failure of the lessee to comply with the lease provisions. This specific grant of authority to cancel for noncompliance with the lease provisions, however, does not affect the defendant's basic authority in the course of an administrative appeal to cancel a lease which has been erroneously issued.

IX

With respect to paragraph 9, defendant admits the allegations in the first and third sentences and denies the allegations in the second and fourth sentences.

X

With respect to the allegations in the first sentence in paragraph 10, defendant admits that on September 11, 1956, the date the Boesche lease offer was filed, the NW¼SW¼, sec. 21 T. 22 N., R. 16 W., Ind. M., was included in a lease offer filed on April 14, 1955, by a third party, and that on December 1, 1956, a lease covering the described 40 acres was issued on the basis of that offer. Defendant denies the remaining allegations in paragraph 10.

XI

Defendant denies the allegations in paragraph 11.

XII

Defendant denies the allegations in paragraph 12.

XIII

The allegations in paragraph 13 constitute a demand for the issuance of a temporary restraining order, which allegations are meaningless in the absence of an appropriate motion.

WHEREFORE, defendant demands that the complaint be dismissed and that he be awarded his costs.

• • • •

THOS. L. MCKEVITT
Attorney, Department of Justice

(Filed September 16, 1960)

• • • •

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, by his attorney, Thos. L. McKevitt, Attorney, Department of Justice, moves for summary judgment of dismissal on the ground that the complaint fails to state a claim upon which relief can be granted.

This motion is based on the pleadings and, in particular, on the material appearing as Exhibit No. 3 to the complaint.

THOS. L. MCKEVITT
Attorney, Department of Justice
Attorney for Defendant

• • • •

(Filed October 20, 1960)

• • • •

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by his attorney, moves the Court for summary judgment, pursuant to Rule 56 F. R. (Civ.) P., in accordance with the relief sought in the complaint. This motion is based on the following grounds:

1. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

2. The material facts are established by the allegations of the complaint and by the admissions of the answer.

Respectfully submitted,

/s/ Lewis E. Hoffman
Attorney for Plaintiff

• • • •

(Filed November 23, 1960)

• • • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having been submitted on cross-motions for summary judgment, accompanied by statements of material facts pursuant to local court Rule 9, the Court hereby makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. A regulation of the Secretary of the Interior relating to administration of the Mineral Leasing Act of 1920, as originally promulgated on June 17, 1952 (43 C.F.R. sec. 192.42(d)), reads, in part, as follows:

> • • • Each offer must be for an area of not more than 2,560 acres except where the rule of approxi-

mation applies, and may not be for less than 640 acres except in any one of the following instances:

(1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.

(2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment.

As amended by Circ. 2017, 24 F.R. 4141, on May 22, 1959, the regulation reads (43 C.F.R. (1960 Supp.) sec. 192.42 (d)), in part, as follows:

* * * An offer may not include more than 2,560 acres except where the rule of approximation applies. The lands in the offer must be entirely within an area of six miles square or within an area not exceeding six surveyed sections in length or width. No offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey, or where the land is surrounded by lands not available for leasing under the act.

2. On August 5, 1959, the Secretary of the Interior affirmed a decision of the Director, Bureau of Land Management, holding for cancellation oil and gas lease New Mexico No. 027951 issued to the plaintiff as of November 15, 1957, covering 80 acres of public lands in Oklahoma. The Secretary held that the plaintiff's lease offer was defective in that it violated the provisions of the above-quoted regulation. The Secretary concluded that, for this reason, the plaintiff was not the first qualified appli-

cant for the lease within the meaning of 30 U.S.C. sec. 226.

3. Plaintiff's application for a lease covering 80 acres of public lands (the W½NW¼, sec. 21, T. 22 N., R. 16 W.) was filed on September 11, 1956. On that date a 40-acre tract of public land (the NW¼SW¼, sec. 21, T. 22 N., R. 16 W.) adjoining the 80 acres described in plaintiff's application was not under lease but was included in oil and gas application New Mexico 018806 filed on April 14, 1955, by one Thomas Connell. These two tracts were surrounded by lands not available for leasing under the Mineral Leasing Act.

4. At a later hour on September 11, 1956, Vincent Cuccia and George E. Conley filed oil and gas lease offer New Mexico 027952 for the same 80 acres covered by the plaintiff's application and also for the above-described 40-acre tract. Effective December 1, 1956, a lease on the 40-acre tract was issued to Connell. Thereafter, a lease covering the 80 acres was issued to the plaintiff by the Manager of the Santa Fe Land Office as of November 15, 1957. By decision of January 24, 1958, the Manager rejected the application of Cuccia and Conley on the ground that the land for which they applied was already leased to the plaintiff.

5. An appeal from this denial was taken to the Director, Bureau of Land Management, who reversed the Manager's decision on the ground that the plaintiff's application was not in accordance with the regulation in that it had failed to include all land available for leasing at the time the application was filed. The Director ordered that the Boesche lease be held for cancellation and that a new lease be issued to Cuccia and Conley. The Director's action was affirmed by the Secretary of the Interior in an opinion dated August 5, 1959. This suit followed. Because of the pendency of this litigation, the Manager has not yet acted on the directive that the Boesche lease be cancelled.

CONCLUSIONS OF LAW

1. The regulation of the Secretary of the Interior set out in 43 C.F.R. sec. 192.42(d) is addressed to and reasonably adapted to enforcement of the Mineral Leasing Act of 1920.

2. An applicant for an oil and gas lease under the Mineral Leasing Act of 1920 is not the first qualified applicant when, in applying for lands in an area where less than 640 acres of public lands are available, he fails to include in his application all of the public lands that are available even though some part of such lands may be included in a pending lease application filed by a third party.

3. In awarding a public lands oil and gas lease to the first qualified applicant, the Secretary of the Interior may cancel or direct the cancellation of a lease covering the same lands erroneously issued by a subordinate to another applicant.

4. The defendant is entitled to judgment.

/s/ GEORGE L. HART, JR.
Judge
United States District Court

• • • •

(Filed November 23, 1960)

• • • •

JUDGMENT

This matter having come on for hearing on defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment, and it appearing that there is no

genuine issue of fact and that defendant is entitled to judgment as a matter of law,

IT IS ORDERED, as follows:

1. The defendant's motion for summary judgment is granted.

2. The plaintiff's cross-motion for summary judgment is denied.

3. Judgment is entered in favor of the defendant and against the plaintiff, and the complaint is dismissed.

Dated this 23rd day of November, 1960.

/s/ George L. Hart, Jr.
Judge
United States District Court

• • • •

(Filed January 19, 1961)

• • • •

NOTICE OF APPEAL

Notice is hereby given this 19th day of January, 1961, that the Plaintiff, Fenelon Boesche, Administrator of the Estate of F. W. C. Boesche, deceased, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of November, 1960, in favor of the Defendant.

/s/ Lewis E. Hoffman
Attorney for Plaintiff

• • • •

[fol. 27] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased, Appellant,

v.

STEWART L. UDALL, Secretary of the Interior, Appellee.

Appeal from the United States District Court for the District of Columbia.

OPINION—Decided November 16, 1961

Mr. Lewis E. Hoffman for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom Assistant Attorney General Clark, Messrs. Roger P. Marquis and Thomas L. McKevitt, Attorneys, Department of Justice, were on the brief, for appellee.

Before Edgerton, Prettyman, and Bazelon, Circuit Judges.

Per Curiam: Appellee's predecessor as Secretary of the Interior issued to appellant's predecessor Boesche a noncompetitive oil and gas lease on 80 acres of public land. [fol. 28] After the Boesche application was filed, Cuccia and Conley filed an application which complied fully with the law and the regulations. The Secretary directed the cancellation of Boesche's lease and the District Court, we think correctly, sustained his action.

By §17 of the Mineral Leasing Act[1] a noncompetitive lease must be issued to the first applicant who qualifies.

---

[1] 49 STAT. 677 (1935), as amended, 30 U.S.C. §226 (1958).

The Secretary is authorized to make rules and regulations.[2] To promote efficient exploitation of mineral deposits on unproven lands,[3] the Secretary requires by regulation that an application must cover at least 640 acres, with two exceptions, one of which is "Where the land is surrounded by lands not available for leasing under the act . . . ."[4] We agree with the District Court that this is a reasonable and valid regulation.

"Not available for leasing" may well mean, not available for leasing *to anybody*. Accordingly the Secretary "has always considered lands covered only by an outstanding application to be available for leasing." Natalie Z. Shell, 62 I.D. 417, 419 (1955). This interpretation is reasonable and we should not reject it.[5] In interpreting "an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). When [fol. 29] Boesche filed his application, an adjoining 40-acre tract had been applied for but not leased. Since that tract was "available for leasing" the Boesche application was insufficient.

Although the Secretary's interpretation of his regulation had "general applicability and legal effect", it was not necessary to publish it in the Federal Register.[6] "The function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgations of rules . . . . But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

---

[2] 41 STAT. 450 (1920), 30 U.S.C. §189 (1958).

[3] Annie Dell Wheatley, 62 I.D. 292 (1955).

[4] 17 F.R. 5615 (June 21, 1952), as amended, 43 C.F.R. 192.42(d) (1961 Supp.).

[5] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140; *Western Union Telegraph Co.* v. *United States*, 2d Cir. 1954, 217 F. 2d 579, 581.

[6] 49 STAT. 501 (1935), as amended, 44 U.S.C. §305(a) (1958).

This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. *McKay* v. *Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F. 2d 35 (1955). Cf. *Hawley* v. *Diller*, 178 U.S. 476, 495.

Affirmed.

[fol. 30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Civil 2463-59

No. 16,238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased, Appellant,

v.

STEWART L. UDALL, Secretary of the Interior, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT—Dated November 16, 1961

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

[fol. 31] [File endorsement omitted]

[fol. 32]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238

[Title omitted]

PETITION FOR REHEARING IN BANC—
Filed November 30, 1961

Appellant, Fenelon Boesche, Administrator of the Estate of F. W. C. Boesche, deceased, respectfully petitions the Court, pursuant to Rule 26 of this Court, for a rehearing in the above entitled cause by the entire Court sitting in banc.

The Per Curiam opinion of this Court in the instant case upholds the Secretary's administrative cancellation of appellant's oil and gas lease New Mexico 027951 which was issued to the late F. W. C. Boesche on December 1, 1957.

[fol. 33] A rehearing in this case by the entire bench of the Court is merited for the following reasons:

(1) The Per Curiam opinion of this Court in the instant case involves fundamental questions regarding the authority of the Secretary of the Interior to cancel administratively oil and gas leases issued by the Department and is clearly in conflict with a previous decision of this Court in *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F. 2d 1070 (1931).

(2) The Per Curiam opinion of this Court in the instant case is contrary to the holding of the Supreme Court of the United States in *Youngstown Company* v. *Sawyer*, 343 U.S. 579 (1951).

The Department Has No Authority to Cancel Appellant's Lease Administratively. The Department Has Not Complied With the Procedure Specified by Law for the Cancellation or Forfeiture of Leases.

The provisions of the Mineral Leasing Act authorizing the cancellation of oil and gas leases are contained in paragraphs one and two of Section 31 of the Mineral Leasing Act, as amended, which provides as follows:

Paragraph 1

> "Sec. 31. Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85, §31, 41 Stat. 450, 30 U.S.C. 188.)"

[fol. 34] *Paragraph 2*

> "Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice *upon the failure of the lessee to comply with any of the provisions of the lease*, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . . . Aug. 8, 1946, c. 916, §9, 60 Stat. 956, 30 U.S.C. 188." (Emphasis supplied.)

Thus, Section 31 specifically provides two distinct procedures for forfeiture and cancellation of oil and gas leases, one judicial and the other administrative. And, Congress expressly limits the authority of the Secretary to cancel a lease administratively to instances when there has been a

"failure of the lessee to comply with any of the provisions of the lease * * *." Congress decreed that the cancellation of a lease for any other cause must be by judicial proceedings brought in the appropriate court, as provided in the first paragraph of Section 31, *supra*.

Cancellation by judicial proceedings was the only method of cancellation authorized by the Congress until 1946, when Congress saw fit to add the second paragraph to Section 31 (60 Stat. 956, 30 U.S.C. 188) authorizing the Secretary to cancel a lease administratively where the lessee fails to comply with lease provisions. The Congressional intent to limit the cancellation authority of the Secretary to instances where there has been a breach of lease provisions by the lessee is clear and explicit.

It is one thing to derive authority to cancel the lease administratively from general language in a statute when the statute is silent on the subject of cancellation; it is beyond dispute, however, that when the Congress has by statute provided specific procedures whereby such action may be taken, the administrative agency cannot ignore the means provided by the Congress and attempt to achieve the same or similar results by another method of its own choice. *Youngstown Company* v. *Sawyer*, 343 U.S. 579 (1951).

[fol. 35] Paraphrasing the remarks of Justice Brandeis in *Wallace* v. *Cutton*, 298 U.S. 229, 237, the language of Section 31 is clear and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Isclin* v. *United States*, 270 U.S. 245, 250-51, "The Statute was evidently drawn with care: its language was plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect an enlargement of it by the court, so that what was omitted * * * may be included within its scope. To supply omissions transcends the judicial functions." The authority of the Secretary to cancel leases administratively "is limited by the scope of the statute." *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284. He "may not extend a statute or modify its provisions." *Campbell* v. *Galeno Chemical Company, et al.*, 281 U.S. 599.

In the case of *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F. 2d 1070 (1931), this Court held unequivo-

cally that the Secretary had no authority to cancel oil and gas leases except as expressly provided in the Mineral Leasing Act. In that case, this Court said: "The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

More recently, the United States Circuit Court of Appeals, Tenth Circuit, held in the case of *Pan American Petroleum Corporation* v. *Ed Pierson, Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior, et al.*, 284 F. 2d 649 (1960), that the Secretary has no statutory authority to administratively cancel an oil and gas lease after its issuance *except for the lessee's breach of the lease provisions*. The Court stated in part, at page 654:

> "* * * the Government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the lease premises. Similarly, the issuance of a patent is the last act of the government in disposing of the non-mineral lands of [fol. 36] the public domain. *Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins. The difference between a patent and an oil and gas lease is no reason for the denial of the power of administrative cancellation of a patent and for the recognition of such power to cancel a lease, unless Congress in the exercise of its authority over the public lands has provided for such administrative cancellation of leases after issuance.* The only provisions of this nature in the Mineral Leasing Act and its amendments, of which we are aware, relates to administrative cancellation of non-producing oil and gas leases issued after 1935 *for breach of lease provisions*, and that has no application here because cancellation is sought for fraud in procurement, not for breach of any lease provisions." (Emphasis supplied.)

and at p. 655:

> "The Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. * * * * The courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. *In the absence of some statutory provisions giving him the power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts.* * * * *." (Emphasis supplied.)

The government's Petition for Writ of Certiorari in the *Pan American* case was denied by the Supreme Court on May 29, 1961.

In the interest of a uniform administration of the Mineral Leasing Act, as amended, the cited conflict between the decisions of this Court should be removed. For all of the foregoing reasons, appellant respectfully urges that this petition for a rehearing in banc be granted.

Lewis E. Hoffman, Suite 404, 711 14th Street, N. W., Washington 5, D. C.;
Leon BenEzra, 810 18th Street, N. W., Washington 6, D. C.,
Attorneys for Appellant.

[fol. 37] Certificate of Counsel

We, Lewis E. Hoffman and Leon BenEzra, attorneys for appellant Fenelon Boesche, do hereby certify that the foregoing petition for rehearing in banc is presented in good faith and not for delay.

Lewis E. Hoffman, Leon BenEzra, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1961

No. 16,238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased, Appellant,

v.

STEWART L. UDALL, Secretary of the Interior, Appellee.

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER GRANTING THE PETITION FOR REHEARING IN BANC AND VACATING THE JUDGMENT ENTERED NOVEMBER 16, 1961—Dated February 21, 1962

Upon consideration of appellant's petition for a rehearing en banc, it is

Ordered by the court that the petition for a rehearing en banc be, and it is hereby, granted and that this case shall be reheard by this court en banc at such date as the business of the court will permit.

It is Further Ordered by the court that the judgment entered herein November 16, 1961, be, and it is hereby, vacated.

Per Curiam.

[fol. 39] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238

[Title omitted]

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting in banc.

ORDER REINSTATING THE NOVEMBER 16, 1961 JUDGMENT—
Dated June 15, 1962

The court in banc having granted appellant's petition for rehearing in banc on February 21, 1962, and the appeal having been reheard by the court in banc, and the court in banc now being of the view that the judgment of the division of this court should be reinstated,

It is Ordered by the court in banc:

(1) that the order entered February 21, 1962, granting the petition for rehearing in banc and vacating the judgment of the division entered November 16, 1961, is hereby set aside;

(2) that the petition for rehearing in banc is hereby denied; and

(3) that the judgment of the division entered herein November 16, 1961, is hereby reinstated.

Per Curiam.

The case was reheard in banc prior to Senior Circuit Judge Prettyman's retirement from active service and was submitted to him on the briefs and recorded argument, but he did not participate in the foregoing order.

[fol. 40] Designation of Record (omitted in printing).

[fol. 41] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 42]

SUPREME COURT OF THE UNITED STATES

No. 332, October Term, 1962

FENELON BOESCHE, Administrator, etc., Petitioner,

vs.

STEWART L. UDALL, Secretary of the Interior.

ORDER ALLOWING CERTIORARI—November 5, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to the question presented by the petition which reads as follows:

"Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

No. 432

Office Supreme Court, U.S.
FILED
AUG 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Petitioner

v.

STEWART L. UDALL,
Secretary of the Interior,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEWIS E. HOFFMAN
Suite 404
711 - 14th St., N.W.
Washington 5, D. C.

LEON BENEZRA
810 - 18th St., N.W.
Washington 6, D. C.
Attorneys for Petitioner

Washington, D. C.
August 14, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Petitioner

v.

STEWART L. UDALL,
Secretary of the Interior,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Fenelon Boesche, Administrator of the estate of F. W. C. Boesche, deceased, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The November 16, 1961 opinion of the Court of Appeals is reprinted as Appendix A, infra pp. 14-16. The Court's Order granting the petition for rehearing in banc is reprinted as Appendix B, infra p. 17. The Per Curiam order of the Court sitting in banc reinstating the Novem-

ber 16, 1961 judgment of the division is reprinted as Appendix C, infra p. 18.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1961. A timely petition for Rehearing *in banc* was granted and the November 16, 1961 judgment of the Court set aside on February 21, 1962. After a Rehearing *in banc* and by per curiam opinion dated June 15, 1962, the Court reinstated the judgment of the division entered on November 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations.[1]

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 30 U.S.C. 181, provides in pertinent part:

> "* * * that deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act * * *."

Section 31 of the Mineral Leasing Act of 1920, 41 Stat. 450, as amended, 30 U.S.C. 188, provides in pertinent part:

---

[1] If the Writ of Certiorari is granted, the Petitioner may also desire to argue the related substantive question of whether there had actually been a failure on the part of the lessee in this case to comply with the Department's regulations.

"Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85, § 31, 41 Stat. 450, 30 U.S.C. 188.).

"Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . . (Aug. 8, 1946, c. 916, § 9, 60 Stat. 956, 30 U.S.C. 188)

Rev. Stat. 441, 5 U.S.C. 485, provides in pertinent part:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

• • • •

4. Bureau of Land Management

• • • •

13. Public lands, including mines.

43 CFR 192.42(d), under the heading "Noncompetitive Leases—Offer to lease and issuance of lease," provides in pertinent part:

"(d) • • • Each offer must be for an area not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:

(1) • • •

(2) Where the land is surrounded by lands not available for leasing under the Act, • • •."

STATEMENT

On September 11, 1956, petitioner's father, F. W. C. Boesche, deceased, filed application for an oil and gas lease (NM 027951) on an 80 acre tract of public land. On that date, an adjoining 40 acre tract was already under application for lease previously filed by Thomas Connell. Also on September 11, 1956, but later in the day, Vincent Cuccia and George E. Conley filed their joint application for a lease on both the 40 acres already applied for by Connell and the 80 acres already applied for by Boesche.

Accordingly, as of the close of business at the Santa Fe Land Office on September 11, 1956, the 40 acre parcel was under application by Connell as the first applicant for that parcel, the 80 acre parcel was under application for lease by Boesche as the first applicant for that parcel, and both parcels were under later application for lease by Cuccia and Conley. Thereafter, and in the following order, the Manager of the Santa Fe Land Office (1) on December 1, 1956 issued a lease on the 40 acre parcel to Connell, (2) on December 1, 1957 issued a lease on the 80 acre parcel to Boesche, (3) by decision of January 24, 1958 (J.A. 11)[2] rejected Cuccia and Conley's application for a lease on the 80 acres already leased to Boesche.[3]

Cuccia and Conley appealed from the Manager's decision to the Director of the Bureau of Land Management. By decision of January 9, 1959 (J.A. 12-14) the Director reversed the Manager's decision, holding that the Manager erred in issuing the Boesche lease and that the Boesche lease should be cancelled for failure to comply with 43 CFR 192.42(d).

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[2] J.A. refers to the Joint Appendix in the Court of Appeals.

[3] On January 17, 1957, following the issuance of the lease to Connell, Cuccia and Conley withdrew their application as to the 40 acre parcel. Hence only the 80 acre parcel remained in their application.

Boesche appealed to the Secretary of the Interior, who, through his Deputy Solicitor issued a decision on August 5, 1959 (J.A. 15-18) affirming the Director's decision and directed cancellation of the Boesche lease. The reason given by the Secretary for this action is that Boesche failed to file for the adjoining 40 acres already covered by the Connell application and therefore violated the Department's regulation, 43 CFR 192.42(d), which requires, inter alia, that a lease offer must include a minimum of 640 acres unless the land applied for is surrounded by lands not available for leasing under the Act.

Petitioner filed timely suit in the United States District Court seeking judicial review of the Secretary's decision.

The Petitioner alleged in the District Court: that there had been no failure of the lessee to comply with the Department's regulation 43 CFR 192.42(d) since the adjoining 40 acres already applied for by Connell was not available for leasing by Boesche; that assuming, arguendo, that Petitioner failed to comply with 43 CFR 192.42(d), this defect was waived by the Land Office Manager, the Secretary's authorized representative, upon his issuance of the oil and gas lease; and, that, the Secretary in the circumstances of this case, had no authority to cancel Petitioner's outstanding lease by unilateral administrative action.

By judgment dated November 23, 1960, the District Court affirmed the Secretary's determination that Petitioner had failed to comply with 43 CFR 192.42(d) and upheld the authority of the Secretary to cancel Petitioner's lease by administrative action (J.A. 22-26).

The Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. By per curiam opinion dated November 16, 1961, the Circuit Court affirmed the decision of the District Court sustaining the Secretary's action authorizing cancellation of Petitioner's

lease. The Court upheld the Secretary's determination that Petitioner had failed to comply with the Department's regulation 43 CFR 192.42(d) and upheld the Secretary's authority to cancel Petitioner's lease. Petitioner's petition for a Rehearing *in banc* was granted by Order of February 21, 1962, of the District of Columbia Circuit and the November 16, 1961 judgment of the Division was vacated and set aside. After the Rehearing *in banc*, the Court *in banc* by per curiam order reinstated the November 16, 1961 judgment of the division.

REASONS FOR GRANTING THE WRIT

1. The judgment of the District of Columbia Circuit in the instant case is in conflict with the judgment of the Tenth Circuit in *Pan American Petroleum Corp.* v. *Pierson et al.*, 284, F.2d 649 (1960), cert. denied 366 U.S. 936.

2. The judgment of the District of Columbia Circuit in this case is contrary to the principle enunciated by this Court in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

3. In the issuance of oil and gas leases the Department of the Interior is acting in a proprietary capacity. As a party to lease contracts the Government is as much bound by the contracts as the individual parties thereto. *Sinking Fund Cases*, 99 U.S. 700, 719 (1878); *Reading Steel Casting Company* v. *United States*, 268 U.S. 186, 188 (1924); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934).

The Provisions of the Mineral Leasing Act authorizing the cancellation of oil and gas leases are contained in paragraphs one and two of Section 31 of the Mineral Leasing Act, as amended, which provides as follows:

PARAGRAPH 1

"Sec. 31. Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85, § 31, 41 Stat. 450, 30 U.S.C. 1881)."

PARAGRAPH 2

"Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ., Aug. 8, 1946, c. 916, § 9, 60 Stat. 956, 30 U.S.C. 188."

Thus, Section 31 specifically provides two distinct procedures for forfeiture and cancellation of oil and gas leases, one judicial and the other administrative. And, Congress expressly limits the authority of the Secretary to cancel a lease administratively to instances when there has been a "failure of the lessee to comply with any of the provisions of the lease * * *." Congress decreed that the cancellation of a lease for any other cause must be by judicial proceedings brought in the appropriate court, as provided in the first paragraph of Section 31, *supra*.

Cancellation by judicial proceedings was the only method of cancellation authorized by the Congress until 1946, when Congress saw fit to add the second paragraph to Section 31 (60 Stat. 956, 30 U.S.C. 188) authorizing the Secretary to cancel a lease administratively where the

lessee fails to comply with lease provisions. The Congressional intent to limit the cancellation authority of the Secretary to instances where there has been a breach of lease provisions by the lessee is clear and explicit.

In the case of *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F.2d 1070 (1931), the Court held unequivocally that the Secretary had no authority to cancel oil and gas leases except as expressly provided in the Mineral Leasing Act. In that case, the Court said: "The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

More recently, the United States Court of Appeals, Tenth Circuit, held in the case of *Pan American Petroleum Corporation* v. *Pierson et al.*, 284 F. 2d 649 (1960), that the Secretary has no statutory authority to cancel an oil and gas lease administratively after its issuance except for the lessee's breach of the lease provisions. The Court stated in part, at page 654:

> "* * * the Government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the lease premises. Similarly, the issuance of a patent is the last act of the government in disposing of the nonmineral lands of the public domain. Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins. The difference between a patent and an oil and gas lease is no reason for the denial of the power of administrative cancellation of a patent and for the recognition of such power to cancel a lease, unless Congress in the exercise of its authority over the public lands has provided for such administrative cancellation of leases after issuance. The only provisions of this nature in the Mineral Leasing Act and its amendments of which we are aware, relates to administrative cancellation of non-

> producing oil and gas leases issued after 1935 for breach of lease provisions, and that has no application here because cancellation is sought for fraud in procurement, not for breach of any lease provisions."

and at p. 655:

> "The Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. * * * * * The courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provisions giving him the power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts. Otherwise the new system created by the Mineral Leasing Act for the disposition of the mineral reserves found on the public lands fails of its purpose. Certainty of title is an elementary prerequisite for the sound development of any mineral resource."

and at p. 657:

> "If Congress desires administrative cancellation of Federal oil and gas leases, it may, in the exercise of its Constitutional authority over the public domain, so provide in appropriate legislation, but we have no such legislation before us."

The Government's Petition for Writ of Certiorari in the *Pan American* case was denied by the Supreme Court on May 29, 1961.

The Tenth Circuit Court of Appeals in the *Pan American* case and petitioner in this case have taken the position that the Secretary's authority to cancel oil and gas leases administratively is limited by the Congress under Section 31 of the Mineral Leasing Act, as amended, to instances where a lessee has violated the provisions of the terms of the lease.

On the other hand, respondent asserts that the Secretary's authority to cancel leases administratively derives

from his general authority under the provisions of 5 U.S.C., Sec. 485.[4]

The Secretary's claim of "general authority" to cancel leases administratively is reminiscent of a similar claim advanced by the Government in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 with respect to the President's "general authority" to seize the steel mills. In that case, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills, in order to avert a nation-wide strike of steel workers in April 1952, which he believed would jeopardize national defense. The Order was not based on any specific statutory authority but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander-in-Chief of the Armed Forces. The principle enunciated by the Supreme Court in *Youngstown Co.* v. *Sawyer*, in denying the President's "general authority" to order seizure of the steel mills, is equally applicable here. Namely, that while the executive branch may invoke its "general authority" to support a course of action when the statute is silent on the subject, after the Congress has by statute provided specific procedures whereby executive action may be taken, the administrative agency cannot ignore the means provided by the Congress and attempt to achieve the same or similar results by another method of its own choice.

The Mineral Leasing Act of February 25, 1920 was enacted by the Congress "* * * to promote the mining

[4] 5 U.S.C. sec. 485 provides as follows: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: 1. Alaska Railroad. 2. Alaska Road Commission. 3. Bounty-lands. 4. Bureau of Land Management. 5. Bureau of Mines. 6. Bureau of Reclamation. 7. Division of Territories and Island Possessions. 8. Fish and Wildlife Service. 9. Geological Survey. 10. Indians. 11. National Park Service. 12. Petroleum Conservation. 13. Public lands, including mines."

of coal, phosphate, oil, oil shale and gas." In some thirty-six sections the Act proceeds to specify comprehensively and in great detail the new procedures to be followed by the Secretary in his administration of the Federal Mineral Leasing Program. Included in these sections is Section 31 providing a specific procedure governing the cancellation of leases issued by the Secretary. The Secretary, in his brief in the Court below, contends that his authority to cancel appellant Boesche's lease derives not from Section 31 of the Mineral Leasing Act, as amended, but from the general authority vested in him by 5 U.S.C. 485 to supervise public lands. This assertion of general authority is made despite the express Congressional directive contained in Section 1 of the Mineral Leasing Act of 1920 to the effect that oil and gas deposits on public lands— "* * * shall be subject to disposition in the form and manner provided by this Act * * *." Thus, in spite of this plain statutory strictures, the Secretary chooses to ignore the specific limitation by the Congress on his authority to cancel leases administratively, and instead he chooses to assert a general authority contained in 5 U.S.C. 485. In effect the Secretary asserts a right to pick and choose which of the sections of the Mineral Leasing Act he will ignore and which he will administer.

In the issuance of oil and gas leases the Department of the Interior is acting in a proprietary capacity. As a party to lease contracts the government is as much bound by the contracts as individual parties thereto. This principle has been enunciated time and again by this Court.

Thus, in the Sinking Fund Cases,[5] this Court said:

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the

[5] 99 U.S. 700, 719 (1878).

> wrong and reproach that term implies, as it would be if the repudiator has been a State or municipality or a citizen."

In *Reading Steel Casting Company* v. *United States*,[6] which was a case involving a contract to furnish steel castings to the Marine Corps, the principle was reiterated by this Court when it said:

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals"

And in *Lynch* v. *United States*,[7] this Court said:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

At the time the Department issued a lease to Boesche it entered into a contract with him. Boesche fulfilled his obligations under the contract and had every right to expect that the Department would likewise honor its obligations.

On June 29, 1962, the Tenth Circuit in *Henriques et al.* v. *Gulf Oil Corp.* No. 1945, (App. D, pp. 20-23) granted the Government's request that its appeal be dismissed on the ground that the case had become moot. The Court, however, in its per curiam opinion pointedly took judicial notice of the Interior Department's declination to accept its ruling in the *Pan American* case when it stated:

> "Representatives of the Interior Department continue to assert the right of administrative cancellation of oil and gas leases issued under the Mineral Leasing Act of 1920, and decline to accept the decision in *Pan American Petroleum Corporation* v. *Pierson*, 10 Cir., 284 F.2d 649, certiorari denied 366 U.S. 936, where

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[6] 268 U.S. 186, 188 (1924).

[7] 292 U.S. 571, 579 (1934).

we denied that right in a case of attempted administrative cancellation because of fraud in procurement."

In his Petition for a Writ of Certiorari, No. 912, Oct. Term, 1960, in the *Pan American* case, *supra*, the Solicitor General at pages 10 and 11 thereof stated:

> "* * * the administration of oil and gas on the public domain constitutes a major program of the Department of the Interior. Each year there are thousands of leases issued. On June 30, 1960, there were outstanding 139,000 leases supervised by the Department of the Interior under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended.
> "* * * in the three-year period ending June 30, 1960, there were 1,129 administrative cancellations out of the total of 54,000 leases issued during that period."

In the interest of a uniform interpretation of the Federal Statute governing administration of this major Federal program this Court should resolve the present conflict between the United States Courts in the 10th and District of Columbia Circuits regarding the Secretary's authority to cancel leases by administrative action.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEWIS E. HOFFMAN
Suite 404
711 - 14th St., N.W.
Washington 5, D. C.

LEON BEN-EZRA
810 - 18th St., N.W.
Washington 6, D. C.
Attorneys for Petitioner

Washington, D. C.
August , 1962

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased,
Appellant

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee

Appeal from the United States District Court for the District of Columbia

Decided November 16, 1961

Mr. Lewis E. Hoffman for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom *Assistant Attorney General Clark*, *Messrs. Roger P. Marquis* and *Thomas L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellee.

Before EDGERTON, PRETTYMAN, and BAZELON, *Circuit Judges*.

PER CURIAM: Appellee's predecessor as Secretary of the Interior issued to appellant's predecessor Boesche a non-competitive oil and gas lease on 80 acres of public land. After the Boesche application was filed, Cuccia and Conley filed an application which complied fully with the law and the regulations. The Secretary directed the cancellation of Boesche's lease and the District Court, we think correctly, sustained his action.

By § 17 of the Mineral Leasing Act[1] a noncompetitive lease must be issued to the first applicant who qualifies. The Secretary is authorized to make rules and regulations.[2] To promote efficient exploitation of mineral deposits on unproven lands,[3] the Secretary requires by regulation that an application must cover at least 640 acres, with two exceptions, one of which is "Where the land is surrounded by lands not available for leasing under the act . . . ."[4] We agree with the District Court that this is a reasonable and valid regulation.

"Not available for leasing" may well mean, not available for leasing *to anybody*. Accordingly the Secretary "has always considered lands covered only by an outstanding application to be available for leasing." Natalie Z. Shell, 62 I.D. 417, 419 (1955). This interpretation is reasonable and we should not reject it.[5] In interpreting "an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). When Boesche filed his application, an adjoining 40-acre tract had been applied for but not leased. Since that tract was "available for leasing" the Boesche application was insufficient.

Although the Secretary's interpretation of his regulation had "general applicability and legal effect", it was not necessary to publish it in the Federal Register.[6] "The

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[1] 49 Stat. 677 (1935), as amended, 30 U.S.C. § 226 (1958).

[2] 41 Stat. 450 (1920), 30 U.S.C. § 189 (1958).

[3] Annie Dell Wheatley, 62 I.D. 292 (1955).

[4] 17 F.R. 5615 (June 21, 1952), as amended, 43 C.F.R. 192.42(d) (1961 Supp.).

[5] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140; *Western Union Telegraph Co.* v. *United States*, 2d Cir. 1954, 217 F. 2d 579, 581.

[6] 49 Stat. 501 (1935), as amended, 44 U.S.C. § 305(a) (1958).

function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgations of rules . . . . But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. *McKay* v. *Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F. 2d 35 (1955). Cf. *Hawley* v. *Diller*, 178 U.S. 476, 495.

Affirmed.

APPENDIX B

Filed Feb. 21, 1962. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238 September Term, 1961

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased,
Appellant

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee

Before: WILBUR K. MILLER, *Chief Judge*, and EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the petition for a rehearing en banc be, and it is hereby, granted and that this case shall be reheard by this court en banc at such date as the business of the court will permit.

It is FURTHER ORDERED by the court that the judgment entered herein November 16, 1961, be, and it is hereby, vacated.

Per Curiam.

Dated: Feb. 21, 1962

APPENDIX C

Filed June 15, 1962. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238 September Term, 1961

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased,
Appellant

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee

Before: WILBUR K. MILLER, *Chief Judge*, and EDGERTON, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting in banc.

ORDER

The court in banc having granted appellant's petition for rehearing in banc on February 21, 1962, and the appeal having been reheard by the court in banc, and the court in banc now being of the view that the judgment of the division of this court should be reinstated,

It is ORDERED by the court in banc:

(1) that the order entered February 21, 1962, granting the petition for rehearing in banc and vacating the judgment of the division entered November 16, 1961, is hereby set aside;

(2) that the petition for rehearing in banc is hereby denied; and

(3) that the judgment of the division entered herein November 16, 1961, is hereby reinstated.

Per Curiam.

Dated: June 15, 1962

The case was reheard in banc prior to Senior Circuit Judge Prettyman's retirement from active service and was submitted to him on the briefs and recorded argument, but he did not participate in the foregoing order.

APPENDIX D

Filed June 29, 1962

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6945—June Term, 1962

DOUGLAS E. HENRIQUES, INDIVIDUALLY AND AS MANAGER OF THE UNITED STATES LAND OFFICE, SANTA FE, NEW MEXICO, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR; CHESLEY P. SEELY, INDIVIDUALLY AND AS STATE DIRECTOR FOR THE STATE OF NEW MEXICO, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR,

Appellants

v.

GULF OIL CORPORATION, a corporation, and CARL T. SMITH, JR.,

Appellees

Appeal from the United States District Court for the District of New Mexico

A. Donald Mileur, Attorney, Department of Justice (Ramsey Clark, Assistant Attorney General, John Quinn, United States Attorney, J. Eugene Gallegos, Assistant United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, were with him on the brief) for Appellants.

Howard C. Bratton (George H. Hunker, Jr., William V. Kastler, David W. Stephens, and Hervey, Dow & Hinkle were with him on the brief) for Appellees.

Before MURRAH, *Chief Judge*, BREITENSTEIN and HILL, *Circuit Judges*.

PER CURIAM.

The judgment of the trial court enjoined the administrative cancellation of a United States oil and gas lease. The defendant officials have appealed and now assert that the case is moot.

Pursuant to the applicable provisions of the Mineral Leasing Act of 1920 as amended,[1] appellee Smith, in October, 1958, made an offer for an oil and gas lease on three separate parcels of the public domain in New Mexico. Later, one Conley made a similar offer covering some of the same land. The Smith offer was approved and a lease issued effective August 1, 1960. Gulf has an interest in the Smith lease under conditional, mesne conveyances. The Conley offer was rejected because of the conflict with the Smith offer. On an appeal by Conley the Appeals Officer held, on February 21, 1961, that the Smith offer violated a pertinent regulation and that Conley was entitled to his lease. Pursuant to this decision appellant Henriques, the manager of the United States Land Office at Santa Fe, New Mexico, on April 21, 1961, cancelled the Smith lease, the cancellation to be effective 30 days thereafter unless an appeal was perfected. Within that period Smith and Gulf brought this action.[2]

During the pendency of this appeal, the Secretary of the Interior, in another case, construed the applicable regulation so as to sustain the validity of the Smith offer. The Acting Chief of the Division of Appeals, on May 15, 1962, vacated the February 21, 1961, decision and rejected the Conley offer. This action leaves the Smith lease in effect and no administrative proceedings for its cancella-

[1] 30 U.S.C. § 181 et seq.

[2] Pursuant to an order for a temporary injunction the manager of the Santa Fe Land Office vacated the order of cancellation. This removed any handicap which might have arisen because of the failure of Smith and Gulf to take an administrative appeal from the order of cancellation.

tion are now either pending or threatened. The objections of Smith and Gulf to the claim of the appellant officials that the appeal is moot are grounded on the possibility of the resumption of administrative cancellation proceedings.

Representatives of the Interior Department continue to assert the right of administrative cancellation of oil and gas leases issued under the Mineral Leasing Act of 1920 and decline to accept the decision in Pan American Petroleum Corporation v. Pierson, 10 Cir. 284 F. 2d 649, certiorari denied 366 U.S. 936, where we denied that right in a case of attempted administrative cancellation because of fraud in procurement. The existence of this general policy does not defeat the claim of mootness. The courts will not interfere with executive actions which have not proceeded so far as to affect individual interests adversely.[3] The rule is that a private person may not invoke the judicial power to determine the validity of executive action unless he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action.[4] In the present posture of this case Smith and Gulf stand in the same position as all holders of United States oil and gas leases.[5]

The possibility of an appeal to the Secretary from the decision rejecting the Conley offer does not change the situation. This is not the case of a private person seeking to defeat injunctive relief by protestations of repentance and reform[6] or of "short term orders, capable of

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[3] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 72.

[4] Ex Parte Albert Levitt, 302 U.S. 633, 634.

[5] Cf. Taylor v. McElroy, 360 U.S. 709, 711.

[6] See United States v. Oregon State Medical Society, 343 U.S. 326, 333.

repetition, yet evading review."[7] As the record stands there is nothing before us to show that the appellant officials threaten to cancel the lease in question. Indeed, their counsel disclaim any such intent and we assume the good faith of all concerned. Accordingly, the case is moot.

When a civil case from a court in the Federal system becomes moot pending appeal, the approved practice is to vacate the judgment below and remand with direction to dismiss.[8] Such action in the case at bar must not be taken as any determination of the substantive issues raised on this appeal. If the Interior Department hereafter seeks administrative cancellation of the lease, this decision does not bar Smith and Gulf from maintaining an action to restrain such cancellation. Further, fairness to all in interest requires that neither the institution nor the dismissal of this action shall be deemed to deprive Smith and Gulf of any rights to contest the Conley offer in administrative proceedings.

Reversed with directions to vacate the judgment and dismiss the action.

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[7] Southern Pacific Terminal Company v. Interstate Commerce Commission and Young, 219 U.S. 498, 515.

[8] United States v. Munsingwear, Inc., 340 U.S. 36, 39.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON B. BOESCHE, Administrator
OF THE ESTATE OF F. W. BOESCHE, Deceased,
PETITIONER

v.

STEWART L. UDALL, Secretary of the Interior

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The government does not oppose the granting of the writ of certiorari in this case. We acknowledge that the decision of the court of appeals here is squarely in conflict with the decision of the Tenth Circuit in *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649, certiorari denied, 366 U.S. 936, which held that a mineral lease cannot be cancelled, in the absence of an express statutory cancellation provision, except in a suit brought by the Attorney General in an appropriate district court. And, as we explained in

our petition for certiorari in the *Pan American* case, the issue is one of great importance in the administration of the public domain by the Department of the Interior.

Under Rev. Stat. 441, as amended, 5 U.S.C. 485, the administration of oil and gas on the public domain constitutes a major program of the Department of the Interior. Each year thousands of leases are issued. On June 30, 1960, there were outstanding 139,000 leases supervised by the Department of the Interior under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181, *et seq.*, which covered 113,000,000 acres. The total number of outstanding leases supervised by the Department under all programs—public lands, acquired lands, Indian, Naval Petroleum Reserve, and Outer Continental Shelf—was 159,000, covering 125,000,000 acres. Because of the size of this program, mistakes in its administration unavoidably occur which require that leases valid on their face be cancelled administratively for reasons existing prior to the issuance of the leases. Thus, in the three-year period ending June 30, 1960, there were 1,129 administrative cancellations out of the total of 54,000 leases issued during that period. While no statistics are available for the period subsequent to June 30, 1960, the Department of the Interior advises us that the annual volume of leases and cancellations has not significantly altered in the last two years.

The Tenth Circuit's decision in the *Pan American* case, with which the decision below is in conflict, seriously jeopardized the authority of the Department of the Interior to continue supervising the leasing pro-

gram. In *Mitchell* v. *Best*, Civil No. 8244, now pending in the United States District Court for the Northern District of California, plaintiff has invoked the authority of *Pan American* in an attempt to contest the administrative cancellation of an oil and gas lease under the Mineral Leasing Act of 1920. Furthermore, there is serious possibility that the reasoning in the Tenth Circuit opinion will be argued to be applicable to cases involving Taylor Grazing Act permits, transmission line easements and all the other myriad of instances when the United States retains fee title, a reversion, or some other interest which must be administered by the Department of the Interior. The consequences of shifting to the courts the exclusive power of cancellation which has heretofore been exercised by the Secretary in all these instances are obvious both from the standpoint of effective and prompt administration and with respect to the workload of the federal courts.

Accordingly, we submit that the issue of the Secretary's authority in this area should be definitively resolved by this Court, and, to that end, the petition for certiorari here should be granted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

SEPTEMBER 1962

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No. 332.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

FENELON BOESCHE, Administrator of the Estate of F. W. C. BOESCHE, Deceased,
Appellant,

vs.

STEWART L. UDALL, Secretary of the Interior,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION OF THE ROCKY MOUNTAIN OIL AND GAS ASSOCIATION FOR SPECIAL LEAVE TO PRESENT ORAL ARGUMENT AS AMICUS CURIAE.

SCOTT A. PFOHL,
Chairman, Legal Committee,
Denver Club Building,
Denver, Colorado.

Of Counsel:

A. G. MCCLINTOCK,
Attorney at Law,
304 West 20th Street,
Cheyenne, Wyoming.

F. I. Mono Graph, Inc. — 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

No. 332.

IN THE

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OCTOBER TERM, 1962.

FENELON BOESCHE, Administrator of the Estate of F. W. C. BOESCHE, Deceased,
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Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION OF THE ROCKY MOUNTAIN OIL AND GAS ASSOCIATION FOR SPECIAL LEAVE TO PRESENT ORAL ARGUMENT AS AMICUS CURIAE

A brief for the Rocky Mountain Oil and Gas Association as *amicus curiae* is being filed pursuant to Rule 42, Rules of the Supreme Court (1954). The questions presented by this appeal are of utmost importance to both the United States Department of the Interior and to the numerous oil and gas companies and private individuals comprising the membership of the Rocky Mountain Oil and Gas Association. The decision of this Court will not only directly affect the practical operation of the Mineral Leasing Act as well as the stability of leasehold titles, so important in promoting the prompt and efficient develop-

ment of the oil and gas deposits in public lands but will also materially affect the economic and property interests of the various members of the Rocky Mountain Oil and Gas Association by reason of their large holdings, as lessees, of Federal Oil and Gas Leases.

The views of the Secretary of the Interior will be presented to this Court by the Solicitor General. The views of the Rocky Mountain Oil and Gas Association are essentially the same as those of the Appellant, Fenelon Boesche, Administrator of the Estate of F. W. C. Boesche, Deceased, but are broader in interest and scope. It is believed that such an oral argument on behalf of the Rocky Mountain Oil and Gas Association will serve to clarify and illuminate the issues in this case and will thereby materially aid the Court in rendering its decision.

It is therefore believed that it is imperative that the *amicus curiae* be given the opportunity to fully and clearly present its viewpoint to the Court. We, therefore, respectfully request that we be given the opportunity to make an oral argument.

Respectfully submitted,

Rocky Mountain Oil and Gas Association,

SCOTT A. PFOHL,
Chairman, Legal Committee,
Denver Club Building,
Denver, Colorado.

Of Counsel:

A. G. MCCLINTOCK,
Attorney at Law,
304 West 20th Street,
Cheyenne, Wyoming.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR OF THE ESTATE OF F. W. C. BOESCHE, Deceased,
Petitioner

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Respondent

On Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

LEWIS E. HOFFMAN
711—14th Street, N.W.
Washington 5, D. C.

LEON BENEZRA
810—18th Street, N.W.
Washington 6, D. C.

Counsel for Petitioner

DECEMBER, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR OF THE ESTATE OF F. W. C. BOESCHE, Deceased,

Petitioner

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Respondent

On Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 27-29) is reported at 303 F. 2d 204 (1962). The findings of fact and conclusions of law of the United States District Court for the District of Columbia (R. 22-25) are unreported. The main decision of the Department of the Interior (R. 15-18) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1961 (R. 29). The order of the Court of

Appeals granting petitioner's petition for rehearing en banc and vacating the Court's judgment of November 16, 1961 was entered February 21, 1962 (R. 35). The order of the Court of Appeals reinstating the November 16, 1961 judgment was entered June 15, 1962 (R. 36). The petition for writ of certiorari was filed on August 14, 1962, and granted on November 5, 1960 (R. 37). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) (1948).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended by the Act of August 8, 1946, 60 Stat. 956, Section 441 of the Revised Statutes (1875), and 43 CFR 192.42(d) are set out in the Appendix, *infra* pp. 34-35.

STATEMENT

On September 11, 1956, petitioner's father, F. W. C. Boesche, deceased, filed application for an oil and gas lease (NM 027951) on an 80 acre tract of public land. On that date, an adjoining 40 acre tract was already under application for lease previously filed by Thomas Connell. Also on September 11, 1956, but later in the day, Vincent Cuccia and George E. Conley filed their joint application for a lease on both the 40 acres already applied for by Connell and the 80 acres already applied for by Boesche.

Accordingly, as of the close of business at the Santa Fe Land Office on September 11, 1956, the 40 acre parcel was under application by Connell as the first applicant for that parcel, the 80 acre parcel was under application for lease by Boesche as the first applicant for that parcel, and both parcels were under later application for lease by Cuccia and Conley. Thereafter, and in the following order, the Manager of the Santa Fe Land Office (1) on December 1, 1956 issued a lease on the 40 acre parcel to Connell,[2] (2) on December 1, 1957 issued a lease on the 80 acre parcel to Boesche, (3) by decision of January 24, 1958 [1] rejected Cuccia and Conley's application for a lease on the 80 acres already leased to Boesche.

Cuccia and Conley appealed from the Manager's decision to the Director of the Bureau of Land Management. By decision of January 9, 1959 (R. 12-14) the Director reversed the Manager's decision, holding that the Manager erred in issuing the Boesche lease and that the Boesche lease should be cancelled for failure to comply with 43 CFR 192.42(d).

Boesche then appealed to the Secretary of the Interior, who, through his Deputy Solicitor rendered a decision on August 5, 1959 (R. 15-18), affirming the Director's decision and directed cancellation of the Boesche lease. The reason given by the Secretary for this action is that Boesche failed to file for the adjoining 40 acres already covered by the Connell application and therefore violated the Department's regulation, 43 CFR 192.42(d), which requires, inter alia, that a lease offer must include a minimum of 640 acres unless the land applied for is surrounded by lands not available for leasing under the Act.

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[1] (R.11).

[2] On January 17, 1957, following the issuance of the lease to Connell, Cuccia and Conley withdrew their application as to the 40 acre parcel. Hence only the 80 acre parcel remained in their application.

Petitioner filed timely suit in the United States District Court seeking judicial review of the Secretary's decision.

The Petitioner alleged in the District Court that there had been no failure by Boesche to comply with the Department's 640 acre regulation. For at the time petitioner Boesche filed his application for the 80 acre tract, the adjoining 40 acre tract had already been applied for by one Connell. Since Connell had a statutory preference right by virtue of his prior application, the Connell 40 acre tract was not available for leasing by Boesche, and the Department did in fact later issue Connell a lease to the 40 acre tract. Thereafter, with full knowledge of the Cuccia-Conley conflicting application, the Department determined that petitioner Boesche was the first qualified applicant for the 80 acre tract and issued a lease to him. Petitioner further alleged that the Department's construction of the 640 acre regulation which served as the basis for the proposed cancellation of the Boesche lease was unsupported by the language of the regulation. The Department's construction of the 640 acre regulation would have required Boesche to perform the idle and superfluous act of top-filing Connell's 40 acre application and to invest a rental sum on a remote speculation that the prior and preferential application by Connell would be rejected or withdrawn. Petitioner stated that in the circumstances of this case it was readily apparent that the Department's construction of the so-called "640 acre" regulation was unreasonable and inappropriate because the Connell application was neither rejected or withdrawn prior to the issuance of the Boesche lease, and that in point of fact, the Department had issued a lease to Connell one year prior to the proposed cancellation of the Boesche lease. This construction of the regulation, moreover was applied after the Department had already determined that Boesche was the first qualified applicant for the Boesche 80 acre tract and after the Department had already issued a lease to Boesche. Petitioner further contended that the Secre-

tary had no statutory authority to cancel his lease; that the authority of the Secretary to cancel leases administratively had been specifically limited by the Congress to instances where:—

1. There is a violation of lease provisions by the lessee and,
2. Until such time as the lands covered by the lease are known to contain valuable deposits of oil and gas.

Petitioner pointed out that there had been no violation of the lease provisions by the lessee Boesche which would warrant administrative cancellation of the lease. Moreover, since the land involved was declared by the Geologic Survey to be within a known geologic structure some two months prior to the Secretary's decision to cancel the Boesche lease—the Secretary's decision to cancel was too late and would violate and be contrary to the express provisions of the governing statute.

By Judgment dated November 23, 1960, the District Court affirmed the Secretary's determination that Petitioner had failed to comply with 43 CFR 192.42(d) and upheld the authority of the Secretary to cancel Petitioner's lease by administrative action (R. 22-26).

The Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. By per curiam opinion dated November 16, 1961, the Circuit Court affirmed the decision of the District Court sustaining the Secretary's action authorizing cancellation of Petitioner's lease. The Court upheld the Secretary's determination that Petitioner had failed to comply with the Department's regulation 43 CFR 192.42(d) and upheld the Secretary's authority to cancel Petitioner's lease. Petitioner's petition for a Rehearing *en banc* was granted by Order of February 21, 1962, of the District of Columbia Circuit and the November 16, 1961 judgment of the Division was vacated and set aside. After the Rehearing

en banc, the Court *en banc* by per curiam order reinstated the November 16, 1961 judgment of the division.

In affirming the decision of the District court, the circuit court below held that the construction by the Secretary of his 640 acre regulation was "reasonable" and "should not be rejected". The court further stated "This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. *McKay* v. *Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F. 2d 35 (1955)."

SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming the District Court's decision upholding the Secretary's authority to cancel petitioner's lease.

A.1. The Secretary of the Interior has no authority under the Mineral Leasing Act of 1920 to cancel petitioner's lease administratively for alleged failure to comply with a Departmental regulation. Section 31 of the Act in its original form expressly provided that cancellation of leases should be by court proceedings in a United States District Court for the district in which the land or any part thereof is located.

2. Section 31 of the Act, as amended in 1946, conferred limited authority on the Secretary to cancel leases "upon failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ."

3. There was no violation by petitioner of any of the lease provisions. Moreover, some two months prior to the Secretary's order to cancel petitioner's lease the land was determined by the Department to be on a known geological structure. Attempted administrative cancellation after

this determination would be contrary to the express provisions of the 1946 amendment to Section 31 of the act.

4. Had Congress intended that the Secretary have authority to cancel leases administratively, it would have expressly provided for such authority, as it did in Section 26 of the Act with respect to prospecting permits. For in Section 26 Congress provided, "That the Secretary . . . may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit . . ."

B.1. The legislative history of the Mineral Leasing Act of 1920 clearly shows that Congress intended that cancellation and forfeiture of leases should be accomplished only by judicial proceedings in a United States district court. This was the understanding not only of both Chairmen of the House and Senate Public Land Committees as expressed in statements by them on the floors of the House and Senate, but it was also the understanding of the then Secretary of the Interior. In his report dated January 3, 1916 to the Chairman of the House Public Land Committee on the pending legislation, Secretary of the Interior Lane stated that the bill required judicial proceedings to effect forfeiture of leases. He also observed that this requirement was designed to protect the rights of lessees.

2. The legislative history of the act discloses, moreover, that an attempt on the floor of the House of Representatives to amend the bill to provide that leases could be cancelled by the Secretary of the Interior was defeated.

C.1. The Secretary's 1930 construction of the Mineral Leasing Act of 1920, in *Melish Consolidated Placer Oil Mining Company* v. *Testerman, et al.*, 53 I.D. 205 (Nov. 7, 1930) squarely states that "The lease once granted was beyond recall by the Secretary and is only subject to can-

cellation in the Federal Courts (Sec. 31, act of February 25, 1920)."

D.1. Shortly after the Secretary's disclaimer of authority to cancel leases, in the *Melish* case, *supra*, the Court of Appeals for the District of Columbia Circuit, in *Bell Oil & Gas Co.* v. *Wilbur*, 64 App. D.C. 256, 50 F. 2d 1070, 1071 (1931) held that "The Secretary, under the terms of the Act, has no power by his own fiat to cancel leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

2. The 1946 amendment to Section 31 of the Mineral Leasing Act[3] expressly confers a limited authority on the Secretary to cancel leases for failure on the part of the lessee to comply with the lease provisions. That Congress considered it necessary to confer this limited power on the Secretary, some 26 years after enactment of the Mineral Leasing Act, tends to buttress the earlier view of the Secretary in the *Melish* case, *supra*, and that of the Court of Appeals in *Bell Oil & Gas Co.* v. *Wilbur*, *supra*, to the effect that the Secretary had no authority to cancel leases administratively after the lease had issued.

3. However, the 1955 decision of the Court of Appeals for the District of Columbia Circuit, in *McKay* v. *Wahlenmaier*,[4] expressed the view that the Secretary had the authority and duty to cancel leases administratively for failure to comply with Departmental regulations.

4. Subsequently, in its opinion of October 3, 1957, the Court of Appeals for the District of Columbia Circuit in *Seaton* v. *The Texas Company* and *Snyder* v. *The Texas Company*,[5] implicitly critized its earlier decision in the

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[3] August 8, 1946, sec. 9, 60 Stat. 956, 30 U.S.C. 188.

[4] 226 F. 2d 35 (1955).

[5] This opinion being unreported is printed in the appendix at pp. 36-43

Wahlenmaier case, *supra*, and squarely held that the Secretary had no authority under the Mineral Leasing Act to cancel a lease issued to a Mr. Dorough. The opinion held moreover that such authority could not be implied. The Court equated a lease to a patent, which under long established decisions of the Supreme Court could only be cancelled by appropriate court proceedings. This opinion of the Court was withdrawn on rehearing and in a second opinion[6] the court set aside the Secretary's cancellation of Dorough's lease on the more limited ground that the Secretary's "cancellation was not permissable as valid administrative action."

5. In 1960, the United States Court of Appeals for the Tenth Circuit, in *Pan American Petroleum Corporation* v. *Pierson*, 284 F. 2d 649 (1960), held that the Secretary had no statutory authority to cancel leases administratively after its issuance except for the lessee's breach of the lease provisions. The Secretary's petition for Writ of Certiorari in this case was denied by this court on May 29, 1961.

6. Under the "patent" cases, this court established a clear line of demarcation between the powers of the Executive branch on the one hand and those of the Judicial branch on the other hand with respect to cancellation of patents and other "like instruments".[7] These cases firmly establish the principle that after a patent or "like instrument" had been issued, the Department could not reconsider its action.[8] Cancellation or forfeiture of these instruments could be accomplished only by judicial proceedings in an appropriate court.[9] Upon conveyance of

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[6] 226 F. 2d 718.

[7] *Johnson* v. *Towsley*, 80 U.S. 72 (1871).

[8] *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929).

[9] *Moore* v. *Robbins*, 96 U.S. 530 (1877).

title the grantee was vested with a property right which could not be taken from him without court proceedings. An administrative attempt to do so would be to deprive him of his property without due process of law.[10]

E.1. In enacting Section 31 of the Act, providing that forfeiture and cancellation of leases should be accomplished by court proceedings, Congress was giving statutory effect to the jurisdictional line of demarcation between the Executive and Judicial branches already established by this court in the "patent" cases.

F.1. The Secretary's assertion of implied authority under Section 441 of the Revised Statutes of 1875, to cancel leases administratively, the express provision of Section 31 of the Mineral Leasing Act of 1920 notwithstanding, cannot be sustained in view of this court's holding in *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952). This case stated the principle that executive power may not be implied to support a course of action contrary to specific procedures provided by statute.

2. Section 37 of the Act provides that "the deposits of coal, phosphate, oil, oil shale and gas . . . shall be subject to disposition only in the form and manner provided by this act . . ." The Secretary's assertion of implied power under Section 441 of the Revised Statutes of 1875 is clearly contrary to the statutory structure contained in Section 37 of the Act. The Secretary may not choose which of the sections of the Act he will administer and which he will ignore.

G.1. Petitioner's lease is not only a conveyance but a contract as well between the United States and Boesche. Under this court's rulings in the Sinking Fund Cases[11]

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[10] *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165 (1893).

[11] 99 U.S. 700. 719 (1878).

"The United States are as much bound by their contracts as are individuals."

2. Upon issuance of the lease to Boesche, he became vested with a right of property which could be divested only by the judgment of a court, after judicial proceedings. Unilateral cancellation of the Boesche lease by the Secretary in *ex parte* administrative proceedings would be an attempt to deprive the petitioner of his property without due process and is therefore void. *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165 (1893).

H.1. Assertion of Secretarial authority to cancel leases seriously impairs the practical operation of the Mineral Leasing Act. For it imposes upon the oil and gas industry already subject to extensive operational hazards, the additional hazard of uncertain lease titles.

ARGUMENT

The Mineral Leasing Act of 1920 [12] was the product of more than six years of active consideration by the Congress [13] during the course of which public hearings were held [14] and extensive debate was had on the floors of the House and Senate. The Act was an expression of a new congressional policy of overhauling the inadequate placer mining laws which provided for the alienation and patenting of Federal minerals and supplanting them with a Federal leasing system.[15]

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[12] 41 Stat. 437; 30 U.S.C. 181.

[13] House Report No. [illegible] (66th Cong. 1st Sess.), p. 12.

[14] Hearings before the Committee on Public Lands, Government Printing Office, 1918.

[15] House Report No. 563 (65th Cong. 2d Sess.) pp. 8-13, 39-40.

A. The Secretary of the Interior Has No Authority Under the Mineral Leasing Act To Cancel Leases Administratively for Failure To Comply With a Departmental Regulation

1. The Secretary of the Interior has no authority under the Mineral Leasing Act of 1920 to cancel Petitioner's lease administratively for alleged failure to comply with a Departmental regulation. Section 31 of the Act in its original form expressly provided that cancellation of leases should be by court proceedings in a United States District Court for the district in which the land or any part thereof is located.

The text of the Section 31 in its original 1920 form reads as follows

> "Sec. 31. Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85 § 31, 41 Stat. 450, 30 U.S.C. 188.)."

2. Section 31 of the Act, as amended in 1946, conferred limited authority on the Secretary to cancel leases upon failure of the lessee to comply with any of the provisions of the lease.

The text of this 1946 amendment to Section 31 reads as follows:

> "Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice *upon the failure of the lessee to*

comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ., Aug. 8, 1946, c. 916, §9, 60 Stat. 956, 30 U.S.C. 188." (Emphasis supplied)

Thus, Section 31, as amended, specifically provides two distinct procedures for forfeiture and cancellation of oil and gas leases, one judicial and the other administrative. And, Congress expressly limits the authority of the Secretary to cancel a lease administratively to instances when there has been a "failure of the lessee to comply with any of the provisions of the lease * * *." Congress decreed that the cancellation of a lease for any other cause must be by judicial proceedings brought in the United States district court as provided in the original form of Section 31, supra.

Thus, it is seen that cancellation by judicial proceedings was the only method of cancellation authorized by the Congress until 1946, when Congress saw fit to add the second paragraph to Section 31 (60 Stat. 956, 30 U.S.C. 188) authorizing the Secretary to cancel a lease administratively where the lessee fails to comply with lease provisions. The Congressional intent to limit the cancellation authority of the Secretary to instances where there has been a breach of lease provisions by the lessee is clear and explicit.

3. There was no violation by Boesche of any of the lease provisions. Moreover, the Secretary's authority to cancel for violation of lease provisions may only be exercised "until the land covered by any such lease is known to contain valuable deposits of oil or gas." In this connection, it should be noted that on May 29, 1959, the Director of the Geological Survey informed the Manager of the Santa Fe Land Office that the land in the Boesche lease was within a known geological structure. The Secretary's order, dated August 5, 1959 to cancel the Boesche lease

is more than two months too late. An attempt to cancel the Boesche lease, if only for this reason is contrary to this express provision of the 1946 amendment of Section 31 of the Act.

4. Had Congress intended that the Secretary have authority to cancel leases administratively, it would have expressly provided for such authority, as it did in Section 26 of the Act with respect to prospecting permits. For in Section 26, Congress provided:

> "That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit. . ."

B. The Legislative History of the Act Shows a Clear Congressional Intent That Cancellation of Leases Should Be Accomplished By Court Proceedings

1. The legislative history of the Mineral Leasing Act of 1920 clearly shows that Congress intended that cancellation and forfeiture of leases should be accomplished by judicial proceedings in a United States district court. This was the understanding not only of both Chairmen of the House and Senate Public Land Committees, but also of the then Secretary of the Interior.

In a letter dated January 3, 1916,[16] the then Secretary of the Interior, Franklin K. Lane, reported to the House Committee on Public Lands on the mineral leasing bill then under consideration as follows:

> "Section 26 provides for appropriate forfeiture *but safeguards the interests of the lessee by requiring such proceedings to be in the United States Court for the district in which the lands or deposits are situate.*" (Emphasis supplied)

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[16] House Report No. 206 (65th Cong. 2d Sess.) at p. 8. House Report No. 563 (65th Cong. 2d Sess.) at p. 23.

This statement by Secretary of the Interior Lane is noteworthy not only because he acknowledged that proceedings for cancellation of leases were required by this legislation to be in the United States Court for the district in which the lands or deposits were located but because of the observation that this requirement was designed to safeguard "the interests of the lessee".

Along the same lines we find the following comments of Senator Lenroot and Senator Smoot, chairman of the Senate Committee on Public Lands, appearing at 58 Congressional Record, p. 4168:

> "Mr. Lenroot. I should like to suggest to both Senators that the Secretary of the Interior has no right or authority under the bill to cancel a lease. It can only be canceled by judicial procedure and a forfeiture . . ."

Senator Lenroot's statement was followed immediately by Senator Smoot's concurring view as follows:

> "Mr. Smoot. There is no doubt in the world that this is true."

The legislative history further discloses that an attempt was made by Representative Anderson on the floor of the House of Representatives to amend S. 2775, which subsequently passed and became the Mineral Leasing Act of 1920, so that leases could be cancelled and forfeited without court proceedings. In this connection the following colloquy between Representative Anderson and Representative Sinnott, then Chairman of the House Public Lands Committee, appears at 58 Congressional Record at p. 7604:

> "Mr. Anderson. Mr. Chairman, I move to strike out the last words. I want to ask the chairman of the committee a question. The provision beginning on line 6, page 6, provides:
>
> > 'Any interests held in violation of this act shall be forfeited to the United States by ap-

propriate proceedings instituted by the Attorney General'

"And so forth.

"I take it that under the language the holding is valid and any operations conducted under it would be valid until after action is brought by the United States. Am I correct in my construction of that language?

"Mr. Sinnott. That would relate to a lease, but not to a permit. The Secretary has certain rights under a permit, but after the permit is merged into a lease, then it will take court action.

"Mr. Anderson. Well, Mr. Chairman, I want to ask what was the reason for that sort of a provision? Ordinarily a lease would be void ab initio, but here you put the entire burden on the Government to proceed to forfeit the lease before anything can be done in the way of showing fraud.

"Mr. Sinnott. It is in recognition of that legal, or equitable, principle that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured.

"Mr. Anderson. I assume a man could scarcely hold a larger amount of land under this act than the act permits, without knowing it. Therefore it seems to me that it ought to provide that the holding of an amount in excess of the amount permitted by the law should be void from the beginning.

"Mr. Sinnott. Well, a man might inadvertently secure more stock than he is entitled to; and it is in line with all court proceedings in relation to forfeiture.

"Mr. Anderson. I move to insert in line 7, page 66, after the word 'be' the words 'void and shall be'. So that it will read:

> 'Any interest held in violation of this act shall be void and shall be forfeited to the United States.'"

Mr. Anderson's motion was defeated and the bill was enacted into law with the provision requiring court proceedings, remaining intact. One could hardly find a more clear and forceful expression of the Congressional intent than is revealed in these statements.

C. The Secretary's 1930 Construction of the Act Was To the Effect That a Lease Once Granted Was Beyond Recall By the Secretary and Was Only Subject To Cancellation In the Federal Courts.

1. The Secretary's 1930 construction of the Mineral Leasing Act of 1920, in *Melish Consolidated Placer Oil Mining Company* v. *Testerman et al.*, 53 I.D. 205 (Nov. 7, 1930) squarely states that although the Leasing Act confers upon the Secretary full power to determine all questions of law and fact essential to the awarding of leases, "The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts (sec. 31, act of February 25, 1920)."

The headnote in this decision summarizes the Secretary's construction of the Act as follows:

> "The Leasing Act confers upon the Secretary of the Interior full power to determine all questions of law and fact essential to the awarding of leases thereunder, and a lease, once granted, is beyond recall by him; thereafter the department is without jurisdiction to review his action and the lease is subject to cancellation only in the Federal Courts."

The decision itself states in part as follows:

> "It is settled that where, by the terms of an act, the Secretary is required upon an application of the claimant to issue a patent, certify a list, approve a location of right-of-way, make a survey or approve a selection, the Secretary has power to make all determinations of law or fact essential to the performance of the duties specifically imposed, and after issuance of patent or other like instrument, his find-

ing of fact is conclusive in the absence of fraud or mistake, not only upon the department, but upon the courts, though his rulings on matters of law are reviewable in the courts they are not subject to reexamination in the department, and his determinations of fact are conclusive, although there is demonstrable error in the estimation or appreciation of evidence. *West* v. *Standard Oil Co.* (278 U.S. 200, 219), and cases therein cited.

"Under the acts under which the award and lease to Testerman and his co-lessees were granted, the department had full power to determine all questions of fact and law essential in properly making such awards and granting leases pursuant thereto. *The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts (Sec. 31, act of February 25, 1920). Jurisdiction of the Department to review his action in granting ceased.* 53 I.D. 207. (Emphasis supplied)

It would be difficult, indeed, to find a clearer and more unqualified disclaimer of any Secretarial authority to cancel leases administratively after a lease issued, than that made by the Department's 1930 decision in this case.

D. Some Court Cases Reviewed

1. Equally categorical in the denial of any Secretarial authority to cancel leases administratively is the 1931 decision of the United States Court of Appeals for the District of Columbia Circuit in the case of *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F. 2d 1070, 1071 (1931). There the court held unequivocally that the Secretary had no authority under the Mineral Leasing Act of 1920 to cancel leases administratively, when it stated:

"The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

2. The 1946 amendment to Section 31 of the Mineral Leasing Act [17] expressly confers a limited authority on the Secretary to cancel leases for failure on the part of the lessee to comply with the lease provisions. That Congress considered it necessary to confer this limited power on the Secretary, some 26 years after enactment of the Mineral Leasing Act, tends to buttress the earlier views of the Secretary in the *Melish* case, *supra*, and those of the Court of Appeals in *Bell Oil & Gas Co.* v. *Wilbur*, *supra*, to the effect that the Secretary had no authority under the Act to cancel leases administratively after the lease had issued.

3. However, the 1955 decision of the Court of Appeals for the District of Columbia Circuit, in *McKay* v. *Wahlenmaier*,[18] expressed the view that the Secretary had the authority and duty to cancel leases administratively for failure to comply with Departmental regulations. In that case, the Secretary found that a Mr. Culbertson had violated the Department's regulations requiring disclosure of his interests as a shareholder in his corporation's federal leases, but the Secretary refused to cancel Culbertson's oil and gas lease. Wahlenmaier filed suit asking the District Court to adjudge Culbertson not a qualified applicant, and to direct the Secretary to cancel the lease issued to Culbertson and to issue the lease to him. The relief was granted, and on appeal, the Court of Appeals affirmed the lower court, holding that the Secretary was bound by his own regulations and that he was "plainly wrong in refusing to cancel the lease . . ." (226 F. 2d at 47). The Court further observed:

> "The Secretary's decision was probably based on confusion as to the nature of the question before him, and misapprehension of his own power and duty to cancel . . . (the) lease . . ."

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[17] Aug. 8, 1946, sec. 9, 60 Stat. 956, 30 U.S.C. 188.

[18] 226 F. 2d 35 (1955).

It is significant that throughout the litigation in the *Wahlenmaier* case, the Secretary never urged the prior precedent of the *Bell Oil & Gas Company* case, *supra*, and for a very good reason. The Secretary had no interest in attacking his oft asserted power to cancel leases, the *Bell* case, *supra*, notwithstanding. The Secretary simply chose not to exercise his asserted power to cancel leases, in the *Wahlenmaier* case. Consequently, the *Wahlenmaier* opinion was issued without benefit of briefs by the parties on the fundamental question of the Secretary's authority to cancel leases.

4. In its opinion of October 3, 1957 [19] the Court of Appeals for the District of Columbia, in *Seaton* v. *The Texas Company* and *Snyder* v. *The Texas Company*, implicitly criticized its earlier decision in the *Wahlenmaier* case, *supra*, and categorically denied the Secretary's right to cancel a lease which had already been issued by the Department to a Mr. Dorough. In denying such Secretarial authority the court stated in part:

> "In court the position of the Secretary and Snyder is that the cancellation of Dorough's lease by the Secretary was reasonable and not arbitrary, and, therefore, the District Court could not reach a different conclusion on the merits. A number of cases are cited, including *Ickes* v. *Underwood*, 78 U.S. App. D.C. 396, 141 F. 2d 546. This position presupposes a cancellation within the administrative competence of the Secretary. But we think that Dorough's lease, even if in some manner irregular, had acquired a status which necessitated judicial proceedings for its outright cancellation. Among the powers conferred by Congress upon the Secretary we find none which authorized his action in this case. If it exists it must be implied, for it is nowhere expressed, and the relevant considerations weigh against implying the power.

[19] This opinion, being unreported, is printed in the appendix at pp. 36-43.

"In the absence of other provision by Congress, and we find none, the controversy was in an area for judicial determination in litigation initiated either by the Secretary or by other parties. It has long been held that once a patent to public land is granted by the United States it may be cancelled only by a court in original proceedings, and not merely on limited judicial review of previous administrative cancellation. *United States* v. *Stone*, 69 U.S. (2 Wall.) 525. *Johnson* v. *Towsley*, 80 U.S. (13 Wall.) 72, 84-87; *Noble* v. *Union River Logging R.R.*, 147 U.S. 165, 176; and cases cited . . . We see no difference in principle here. We need not consider whether Congress could provide otherwise consistently with due process of law. See however, *Noble* v. *Union River Logging R.R.*, *supra*, at p. 176. Congress has not provided otherwise. Congress has provided in 30 U.S.C. Sec. 188, not here applicable, for a judicial and administrative proceeding for cancellation of leases in the circumstances and in the manner there stated. This is persuasive that Congress intended cancellation in other circumstances to be accomplished in a manner usual to the disposition of conflicting claims to the same interests stemming from a common grantor.

"It is our opinion that the lease to Dorough could be cancelled against his will, or that of his assignee, only by judicial proceedings."

Before this opinion was printed, a rehearing was granted and the opinion of the Court was withdrawn and a second opinion substituted therefor. The Court's second opinion, appearing at 256 F. 2d 718 (1958), set aside the Secretary's cancellation of Dorough's lease on the more limited ground that the Secretary's "cancellation was not permissible as valid administrative action". The Court's explanation of the withdrawal of its October 3, 1957 decision appears at 256 F. 2d 721, a portion of which is contained in footnote [20] below:

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[20] "On October 3, 1957, we rendered an opinion that the judgment of the District Court should be affirmed as to the restoration of the lease to Dorough, held now by the Texas Company, on the

5. More recently, the United States Circuit Court of Appeals, Tenth Circuit, held in the case of *Pan American Petroleum Corporation* v. *Ed Pierson, et al.*, 284 F. 2d 649 (1960), that the Secretary has no statutory authority to administratively cancel an oil and gas lease after its issuance except for the lessee's breach of the lease provisions. The Court stated in part, at pages 654 and 655:

> "* * * the Government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the lease premises. Similarly, the issuance of a patent is the last act of the government in disposing of the non-mineral lands of the public domain. Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins. The difference between a patent and an oil and gas lease is no reason for the denial of the power of administrative cancellation of a patent and for the recognition of such power to cancel a lease, unless Congress in the exercise of its authority over the public lands has provided for such administrative cancellation of leases

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ground that it could not be cancelled without judicial proceedings instituted for that purpose. We relied principally upon decisions of the Supreme Court that a patent to land once issued by the United States could be cancelled only by the 'judgment of a court,' citing *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176, 13 S. Ct. 271, 275, 37 L. Ed. 123; *Johnson* v. *Towsley*, 13 Wall. 72, 84-87, 80 U.S. 72, 84-87, 20 L. Ed. 485; *United States* v. *Stone*, 2 Wall 525, 535, 69 U.S. 525, 535, 17 L. Ed. 765; and other cases. The Secretary's petition for rehearing *en banc* was denied, but the court which originally decided the case granted a rehearing and the case has been reargued before us.

"If the cancellation of the Dorough lease was not permissible under the principles laid down in the land patent cases it should be set aside. If cancellation was not permissible as valid administrative action of the Secretary it should be set aside for that reason. We think it was not valid administrative action. This makes it unnecessary to cope with the applicability of the land patent cases, and we accordingly withdraw our opinion of October 3, 1957."

> after issuance. The only provisions of this nature in the Mineral Leasing Act and its amendments of which we are aware, relates to administrative cancellation of non-producing oil and gas leases issued after 1935 for breach of lease provisions, and that has no application here because cancellation is sought for fraud in procurement, not for breach of any lease provisions."

and at p. 655:

> "The Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. * * * The Courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provisions giving him the power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts. * * *"

The Secretary's Petition for Writ of Certiorari in the *Pan American* case was denied by this court on May 29, 1961.

6. The "patent" cases of this court, cited by the 10th Circuit in the *Pan American* case, *supra*, and by the October 13, 1957 opinion of the District of Columbia Circuit in the *Texas Company* cases, *supra*, are clearly applicable in principle to the question in this case, because they established a clear line of demarcation between the powers of the Executive branch on the one hand and those of the Judicial branch on the other hand with respect to cancellation and forfeiture of patents and "like instruments".

In *Johnson* v. *Towsley*, 80 U.S. 72 (1871), this court addressed itself to the problem presented by the then existing practice of the Land Department of cancelling patents after they had been issued. The problem was stated by this court as follows:

> "It is very well known that the officers (of the Land Department) do not confine themselves to de-

> termining, before a patent issues, who is entitled to it, but they frequently assume the right, long after the patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it, they issue a second . . . If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights?" (80 U.S. at p. 84).

This court went on in the case to establish a line of demarcation between the jurisdiction of the executive and the courts as follows:

> "This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the Government, and in reference to the proceedings before the officers entrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as title remained in the United States and the matter was rightfully before those officers for decision. On the other hand the right of the proper courts to inquire, after title had passed from the Government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law." (80 U.S. at p. 87).

The view expressed by this court in *Johnson* v. *Towsley*, was further elaborated in *Moore* v. *Robbins*, 96 U.S. 530 (1877), as follows:

> "While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the

> United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the land office. . . . With the title passes all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." (96 U.S. 532, 533)

In *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 176 (1893), this court extended the principle enunciated in *Moore* v. *Robbins*, *supra*, in patent cases, to rights-of-way granted by the Secretary. In this right-of-way case, the court held that once the Secretary determined that the Railroad Company was entitled to a grant of a right-of-way under the applicable statute:

> "The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. . . . A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore void. As was said by Justice Grier in *United States* v. *Stone*, 2 Wall. 525, 535: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.' *Moore* v. *Robbins*, 969 U.S. 530."

In *West* v. *Standard Oil Co.* 278 U.S. 200 (1929), the doctrine of the so-called patent cases was deemed to be equally applicable to "like instruments" issued by the Land Department. At 278 U.S. 218-219 this court stated:

"Where by the terms of an act, the Secretary is required upon application of the claimant, to issue a patent, as in *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 592; or to certify a list, as in *Frasher* v. *O'Connor*, 115 U.S. 102, 115-116, or to approve a location as in *Noble* v. *Union River Logging R.R.* Co., 147 U.S. 165; or to make a survey and approve a selection, as in *Shaw* v. *Kellogg*, 170 U.S. 312, Congress, by implication, confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. *After issue of the patent or like instrument*, his findings of facts are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts, *DeCambra v. Rogers*, 189 U.S. 119; *Love* v. *Flahive*, 205 U.S. 195, 198; and though his rulings on matters of law are reviewable in the Courts, *Doolan* v. *Carr*, 125 U.S. 618, 625; *Wisconsin Central R.R.* v. *Forsythe*, 159 U.S. 46, 61, *they are not subject to re-examination by the Department. Johnson* v. *Towsley*, 13 Wall. 72, 83-84." (Emphasis supplied)

E. In Section 31 of the Act Congress Was Giving Statutory Effect To the Jurisdictional Line of Demarcation Between the Executive and Judicial Branches Established By This Court In the "Patent" Cases.

1. Our nation's history is replete with instances where principles of law formulated by the courts have been subsequently enacted into statutory law by the legislative branch of the government. We have such an instance here. In enacting Section 31 of the Act, providing that forfeiture and cancellation of leases should be accomplished by court proceedings, Congress was giving statutory effect to the jurisdictional line of demarcation between the Executive and Judicial branches already established by this court in the "patent" cases.

F. The Secretary's Assertion of Implied Authority To Cancel Leases Cannot Be Sustained In View of This Court's Holding In *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952).

1. The Secretary's assertion of implied authority under Section 441 of the Revised Statutes of 1875, to cancel leases administratively, the express provision of Section 31 of the Mineral Leasing Act of 1920 notwithstanding, cannot be sustained in view of this court's holding in *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952). In that case, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills, in order to avert a nation-wide strike of steel workers in April 1952, which he believed would jeopardize national defense. The Order was not based on any specific statutory authority but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander-in-Chief of the Armed Forces. The principle enunciated by the Supreme Court in *Youngstown* v. *Sawyer*, in denying the President's "general authority" to order seizure of the steel mills, is equally applicable here. Namely, that while the executive branch may invoke its "general authority" to support a course of action when the statute is silent on the subject, after the Congress has by statute provided specific procedures whereby executive action may be taken, the administrative agency cannot ignore the means provided by the Congress and attempt to achieve the same or similar results by another method of its own choice.

Paraphrasing the remarks of Justice Brandeis in *Wallace* v. *Cutton*, 298 U.S. 229, 237 (1936), "The language of Section . . . (31) is clear and on the face of the statute there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States*, 270 U.S.

245, 250-251. 'The Statute was evidently drawn with care; its language was plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect an enlargement of it by the court, so that what was omitted . . . may be included within its scope. To supply omissions transcends the judicial functions.'"

2. The Mineral Leasing Act of February 25, 1920 was enacted by the Congress "* * * to promote the mining of coal, phosphate, oil, oil shale and gas." Section 37 of this Act specifically provides that "the deposits of coal, phosphate, oil, oil shale and gas * * * *shall be subject to disposition only in the form and manner provided by this act* * * *." (Emphasis supplied). In some thirty-eight sections the Act proceeds to specify comprehensively and in great detail the procedures to be followed by the Secretary in his administration of the Federal Mineral Leasing Program. Included in these sections is Section 31 providing specific judicial procedures governing the concellation of leases issued by the Secretary. The Secretary's assertion of general authority is made despite the express Congressional directive contained in Section 37 of the Mineral Leasing Act to the effect that oil and gas deposits on public lands—"* * * *shall be subject to disposition only in the form* and manner provided by this Act * * *." (Emphasis supplied). In spite of this plain statutory stricture, the Secretary chooses to ignore the specific limitation by the Congress on his authority to cancel leases administratively, and instead he chooses to assert a general authority contained in Section 441 of the Revised Statutes of 1875. If the Secretary may ignore or nullify Section 31 of the Mineral Leasing Act of 1920 as regards his authority to cancel leases and lieu thereof set up his general authority under the 1875 statute, as being more to his liking, why cannot the Secretary by the same rationale ignore or nullify other sections of the Mineral Leasing Act? Is the Secretary within his right to pick and choose which of the sections

of the Mineral Leasing Act of 1920 he will ignore and which he will administer?

The broad power of control and supervision conferred upon the Secretary by Section 441 of the Revised Statutes of 1875 does not clothe him with any discretion to substitute his judgment for the will of Congress as manifested in the Mineral Leasing Act of 1920 (See *West* v. *Standard Oil Co.*, 278 U.S. 200). To read into Section 441, by implication, Secretarial authority to cancel leases administratively for failure to comply with Departmental regulations, would be to create a power contrary to the express intention of Congress which specifically provided under Section 31 of the Mineral Leasing Act of 1920, as amended, that cancellation of leases for failure to comply with Departmental regulations should be by court proceedings in a United States District Court for the district in which the land or any part thereof is located.

G. Issuance of the Lease To Boesche Bound the Secretary In Contract and Vested Petitioner With a Property Right Which Could Be Divested Only By Judgment of a Court

1. The Department of the Interior as the lessor of oil and gas leases is operating in a proprietary capacity. The magnitude of this proprietary business is reflected in two 1962 Press Releases issued by the Department. On January 24, 1962 the Bureau of Land Management issued a Press Release to the effect that the anticipated receipts from public lands for Fiscal Year 1962 are estimated at $383,000,000. Again in a Press Release dated March 23, 1962, the Interior Department reported that it had received off-shore oil bids totalling $445,835,000. Thus in these two items alone we are talking about Federal leasing income for Fiscal Year 1962 exceeding three-quarters of a billion dollars. These are amounts which grow out of the Department's contractual relations. Any

one who has had any experience dealing with the Department of the Interior would attest to the fact that the Department will zealously collect every single dollar to which the public treasury has been entitled to by contract, and justly so. But contractual benefits as we well know carry with them correlative obligations, which the Government, when it is acting in a proprietary capacity, is duty bound to fulfill.

Petitioner herein proceeds on the basic premise that the subject lease besides being a conveyance is also a contract between the United States and himself for the use of property and that with respect to such contract the Government is as much bound by it as is the individual party thereto. This principle has been enunciated time and again by this Court. As this Court stated in the *Sinking Fund Cases*:[21]

> "The United States are as much bound by their contracts as are individuals. If they repudiated their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator has been a State or municipality or a citizen."

In *Reading Steel Casting Company* v. *United States*[22] which was a case involving a contract to furnish steel castings to the Marine Corps, the principle was reiterated by the Supreme Court when it said:

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals."

And in *Lynch* v. *United States*,[23] the Supreme Court said:

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[21] 99 U.S. 700, 719 (1878).

[22] 268 U.S. 186, 188 (1925).

[23] 292 U.S. 571, 579 (1934).

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Applying this principle specifically to oil and gas leases, the United States District Court for the Southern District of California, in the case of *United States* v. *General Petroleum Corporation*,[24] stated:

> "In resolving the foregoing isues it must be remembered that the (Federal) Government's role is taken to be no different from that of any private lessor or proprietor, for while the Kettleman Hills lands involved are public mineral lands, and as such until their disposition are under the supervision and control of Congress, the Government as to such lands acts in a proprietary capacity, and treats with them in the same way as does the private landowner. Regardless of the type of lease Congress might authorize, a lease executed in accordance with what it *has* authorized becomes a private contractual matter and is to be interpreted according to the general rules of law respecting contracts between individuals."

Thus, we find the courts generally expressing the view that contracts, including leases, entered into between the United States and individuals are subject to the same general rules of law that apply to contracts between private parties.

The Department issued a lease to Petitioner Boesche. Petitioner Boesche has fulfilled his lease obligations and has every right to expect that the Department will likewise honor its obligations.

2. Upon issuance of the lease to Boesche, he became vested with a right of property which could be divested only by the judgment of a court, after judicial proceedings. Unilateral cancellation of the Boesche lease by the Secretary in *ex parte* administrative proceedings would

[24] 73 F. Supp. 225, 234 (1947) affirmed 184 F. 2d 802.

be an attempt to deprive the petitioner of his property without due process and is therefore void. *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 176 (1893).

H. Assertion of Secretarial Authority To Cancel Leases Seriously Impairs the Practical Operation of the Act.

1. In discussing the practical consequences of the Secretary's asserted authority to cancel leases administratively, Judge Breitenstein in the *Pan American* case, *supra*, stated, in part at 284 F.2d 655:

> "If there may be administrative cancellation of an oil and gas lease . . . the practical operation of the Mineral Leasing Act is seriously impaired. It is common knowledge that exploration for oil and gas is costly. The drilling of wells requires substantial financial risks and the expense of putting those wells on production and of marketing the product is burdensome. If continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed. No prudent operator would be willing to accept the financial risks if he were subject to ouster because of some administrative decision based upon improper conduct of an assignor occurring at some distant time in the past." (citing cf. *Moore* v. *Robbins*, *supra*, 96 U.S. at page 534.)

The requirement of court proceedings in a United States District Court for cancellation and forfeiture of leases for failure to comply with Departmental regulations is clear and explicit in the language of Section 31 of the Mineral Leasing Act. To permit the Secretary to cancel leases in such circumstances would not only be contrary to Congressional mandate, but it would as well impose upon the oil and gas industry, already burdened with great operational hazards, the additional hazard of uncertain lease titles.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

LEWIS E. HOFFMAN
711—14th Street, N.W.
Washington 5, D. C.

LEON BENEZRA
810—18th Street, N.W.
Washington 6, D. C.

Counsel for Petitioner

December, 1962

APPENDIX

The pertinent provisions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, are as follows:

Sec. 26. "That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit . . ." (30 U.S.C. 183)

Sec. 31. "That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general regulations promulgated under this act and in force at the date of the lease; * * *".

The Act of August 8, 1946, 60 Stat. 956, in section 9, thereof, amended section 31 of the Mineral Leasing Act of 1920, by adding at the end thereof, the following:

> "Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ." (30 U.S.C. 188).

Sec. 37. "That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided in this act . . ." (30 U.S.C. 193)

Section 441 of the Revised Statutes (1875) provides in pertinent part:

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * *

Second. The public lands, including mines."

43 CFR 192.42(d), under the heading "Noncompetitive Leases—Offer to lease and issuance of lease." provides in pertinent part:

"(d) * * * Each offer must be for an area not more than 2,560 acres except where the rule of approximation applied, and may not be for less than 640 acres except in any one of the following instances:

(1) * * *

(2) Where the land is surrounded by lands not available for leasing under the Act, * * *."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, individually and as Secretary of the Interior, APPELLANT

v.

THE TEXAS COMPANY, APPELLEE

No. 13637

JOHN SNYDER, APPELLANT

v.

THE TEXAS COMPANY, APPELLEE

Appeals from the United States District Court for the District of Columbia

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Decided October 3, 1957

Mr. Roger P. Marquis, Attorney, Department of Justice, with whom Mr. S. Billingsley Hill, Attorney, Department of Justice, was on the brief, for appellant in No. 13636.

Mr. James R. Browning for appellant in No. 13637.

Mr. John J. Wilson, with whom Messrs. Roger J. Whiteford and Philip S. Peyser were on the brief, for appellee.

Before Bazelon, Fahy and Burger, Circuit Judges.

FAHY, CIRCUIT JUDGE: The Secretary of the Interior and John Snyder appeal from a judgment of the District

Court that appellee The Texas Company, assignee of Thomas G. Dorough, is the holder of a valid oil and gas lease on forty acres of land in North Dakota and that Snyder should surrender for cancellation a lease to him on the same acreage.[1]

Dorough applied April 19, 1948, for a noncompetitive oil and gas lease on some 2000 acres, including the forty acres in question. His application was made pursuant to the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 (1952), and was filed with the Bismarck, North Dakota, district land office of the Bureau of Land Management, Department of the Interior. The Act of 1920 authorizes the leasing of "public domain lands," and for purposes of an oil and gas lease the forty acres were of that character. By letter of January 25, 1949, however, the regional office of the Bureau at Billings, Montana, informed Dorough that most of the land covered by his application, including the forty acres, was "acquired land" and not public domain land. "Acquired land" is not in terms authorized to be leased under the Act of 1920, and furthermore, an application for a lease on land of that character should be made with the Washington office of the Bureau. Dorough, in reply to the letter of January 25, asked the regional office to forward his application to Washington, "with a request that it be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority. On December 1, 1951, the United States, through the Bureau, issued to Dorough an oil and gas lease on this land, denominated a "Lease of Oil and Gas Lands Under the Act of August 7, 1947." That Act, 61 Stat. 913, 30 U.S.C. § 351 (1952), in terms authorizes the leasing only of acquired land.

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[1] The forty acres are described as follows: NE¼ SW¼ of Section 7 in Township 153 N., Range 95W., 5th Principal Meridian, McKenzie County, North Dakota.

Previous to the lease to Dorough, but after his application, Snyder filed with the Bureau of Land Management in Washington an application for an oil and gas lease on the same forty acres as well as on other land, all as public domain land and "pursuant and subject to" the Act of 1920. His application was transmitted to the office at Billings, Montana. It was at first rejected as to the forty acres in question but this action was revoked upon a showing that those acres were in fact public domain land. On April 24, 1953, a lease that had been issued to Snyder under the 1920 Act, was amended to include the forty acres, thus giving Snyder a lease to the same land and under the same Act as Dorough had originally sought for himself. The Bureau found that when the United States had issued a land patent on these forty acres in 1940 it had reserved the oil and gas rights. The land had been reconveyed to the United States two years later, but the oil and gas had remained at all times part of the public domain and were not "acquired."

On February 16, 1954, the Chief, Division of Minerals of the Bureau, at the request of Snyder, and without notice to Dorough, cancelled the lease to Dorough of December 1, 1951, on the ground that it had been erroneously issued under the Act of 1947, which was not available for the leasing of public domain land. On appeal to the Secretary of the Interior, taken by The Texas Company and Dorough, the Bureau decision was affirmed on the grounds hereinafter stated.[2] The Texas Company thereupon filed its complaint in the District Court. The parties there stipulated that the court should determine whether the Texas Company or Snyder holds the valid lease on the forty acres, except that "the stipulation was not to apply in the event that the Court's decision was based upon a finding that the purported cancellation of

[2] Dorough also petitioned for reinstatement of his lease, which was denied.

plaintiff's lease was not effective because of the lack of a judicial proceeding." The District Court ordered the Secretary to restore the lease to The Texas Company and directed Snyder to surrender his lease for cancellation by the Secretary. We affirm as to the restoration of the lease to "The Texas Company on the ground that judicial proceedings were essential to cancellation of the lease to Dorough, The Texas Company's assignor.

Dorough's original application, as we have seen, was filed under the proper statute, the Act of 1920. But the Secretary ruled that when the regional office by its letter of January 25, 1949, mistakenly informed Dorough that the forty acres were not public domain land but acquired land which could not be leased on his application made pursuant to the 1920 Act, and Dorough then asked the regional office to forward his application to Washington to be treated as an application for a lease on acquired lands, which was done, thereafter "Dorough's only valid application for the disputed tract was . . . an acquired land application filed in accordance with the pertinent regulations . . . with the Bureau of Land Management in Washington," while Snyder's application, though filed after Dorough's, was in proper form for public domain land. In this situation the Secretary ruled that Dorough's application "was not a proper one and failed to earn him the preference right to a public land oil and gas lease," and Snyder became the first qualified applicant with a proper application. See 30 U.S.C. § 226 (1952).

In court the position of the Secretary and Snyder is that the cancellation of Dorough's lease by the Secretary was reasonable and not arbitrary, and, therefore, the District Court could not reach a different conclusion on the merits. A number of cases are cited, including Ickes v. Underwood, 78 U. S. App. D. C. 396, 141 F.2d 546. This position presupposes a cancellation within the administrative competence of the Secretary. But we think that

Dorough's lease, even if in some manner irregular, had acquired a status which necessitated judicial proceedings for its outright cancellation. Among the powers conferred by Congress upon the Secretary we find none which authorized his action in this case. If it exists it must be implied, for it is nowhere expressed. And the relevant considerations weigh against implying the power. The Secretary leased the forty acres to Dorough under the 1947 Act after Dorough had been advised, though no doubt erroneously, that his application under the 1920 Act was under the wrong Act. No other application preceded his. Seventeen months after leasing to Dorough the Secretary leased exactly the same land to Snyder, but under the 1920 Act. Ten months passed and then at Snyder's request a division chief, without notice to Dorough, cancelled Dorough's lease, action which was affirmed administratively by the Secretary after appeal to him and a hearing. The courts are asked to hold that this action cannot be set aside except for arbitrariness, and that in determining the question of arbitrariness the factual findings of the Secretary cannot be disturbed at all. We are not justified in implying the existence of such a method for disposing of the matter. In the absence of other provision by Congress, and we find none, the controversy was in an area for judicial determination in litigation initiated either by the Secretary or by other parties. It has long been held that once a patent to public land is granted by the United States it may be cancelled only by a court in original proceedings, and not merely on limited judicial review of previous administrative cancellation. United States v. Stone, 69 U.S. (2 Wall.) 525;[3]

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[3] In this case the Court said:

> Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the

Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 84-87; Noble v. Union River Logging R.R., 147 U.S. 165, 176; and cases cited;[4] Chandler v. Calumnet and Heda Mining Co., 149 U.S. 79;[5] Burke v. Southern Pac. R.R., 234 U.S. 669, 692, 710; and see Witbeck v. Hardeman, 51 F.2d 450, 452 (5th Cir.); Lane v. Watts, 234 U.S. 525, 540, affirming Lane v. Watts, 41 App. D.C. 139; United States v. Bell Tel. Co., 128 U.S. 315, 365; Ickes v. Fox, 300 U.S. 82. We see no difference in principle here. We need not con-

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officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

[4] There was jurisdiction in the Secretary to have issued the lease originally to Dorough, notwithstanding he did so mistakenly under the 1947 Act rather than the 1920 Act. See Noble v. Union River Logging R.R., supra, at 176. In other words, the mistake was not a jurisdictional one.

[5] This case is of special interest. Defendant claimed title through an 1855 patent issued under an 1852 Act of Congress providing for the grant of land to Michigan to finance a canal. Plaintiff claimed through an 1887 patent which he contended was issued under an 1850 Act of Congress providing for grant of land for swamp drainage. Plaintiff attempted to prove by oral testimony that the land in question was in fact swamp land. The Court excluded this evidence, but went on to say that assuming the evidence were competent, that the land were swamp, and that

> the State, in patenting the demanded premises to the canal company, acted under mistake or misapprehension as to the character of the land so conveyed, still so long as that patent remains uncancelled and unrevoked by the State, it must be held that its legal effect was and is to pass whatever title the State had to the tract in question, however that title may have been originally acquired by the State.
>
> * * * * *
>
> It is well settled that the State could have impeached the title thus conveyed to the canal company only by a bill in chancery to cancel or annul it, either for fraud on the part of the grantee, or mistake or misconstruction of the law on the part of its officers in issuing the patent, and until so cancelled or annulled it could not issue to another party any valid patent for the same land.

sider whether Congress could provide otherwise consistently with due process of law. See, however, Noble v. Union River Logging R.R., supra, at p. 176. Congress has not provided otherwise. Congress has provided in 30 U.S.C. § 188, not here applicable, for a judicial and an administrative proceeding for cancellation of leases in the circumstances and in the manner there stated. This is persuasive that Congress intended cancellation in other circumstances to be accomplished in a manner usual to the disposition of conflicting claims to the same interests stemming from a common grantor.

We think McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F.2d 35, does not decide that administrative cancellation was available to the Secretary in the present case. There we held that the Culbertson lease should be cancelled, and ordered the Secretary to cancel it. We did say also that the Secretary could have cancelled in the situation there presented, but the fact is the cancellation was ordered by the court as the result of a judicial proceeding, and not on review of administrative cancellation. In Call v. Richfield Oil Corp., 101 F. Supp. 972 (S.D. Cal.), also relied upon by the Secretary, it seems that the court thought that if a lease were not valid it could be cancelled by the Secretary administratively; but this leaves unanswered the question as to how the question of validity, or of appropriate relief in case of invalidity or irregularity, is first to be adjudicated. Even if we were to assume a measure of invalidity, it would not follow that all rights of the lessee were terminated. In other words, in the circumstances here presented—and we do not deal with all possible situations—the ultimate rights and duties of the parties, including the United States, cannot be so molded initially by administrative corrective action as to be subject only to the limited judicial scrutiny applicable where an administrator acts within his sphere of discretion, as

in United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, and like cases.

It is our opinion that the lease to Dorough could be cancelled against his will, or that of his assignee, only by judicial proceedings. In view of this we affirm the judgment of the District Court insofar as it orders the Secretary to restore the lease to The Texas Company, Dorough's assignee, without prejudice, however, to further proceedings not inconsistent with this opinion, initiated either by the Secretary or by others. Since we do not prejudge the outcome of such proceedings it is necessary to vacate that part of the judgment of the District Court which orders Snyder's lease to be surrendered for cancellation.

It is so ordered.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 332.

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Appellant,

vs.

STEWART L. UDALL, Secretary of the Interior,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF AMICI CURIAE, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, MID-CONTINENT OIL AND GAS ASSOCIATION AND NEW MEXICO OIL AND GAS ASSOCIATION.

SCOTT A. PFOHL
Chairman, Legal Committee,
Rocky Mountain Oil and Gas Association,
Denver Club Building,
Denver, Colorado,

NORBERT E. PROCTOR,
Chairman, Subcommittee on Public Lands Matters of Legal Committee,
Mid-Continent Oil and Gas Association,
101 University Boulevard,
Denver, Colorado,

HOWARD C. BRATTON,
Chairman, Public Lands Committee,
New Mexico Oil and Gas Association,
Hinkle Building,
Post Office Box 10,
Roswell, New Mexico.

Of Counsel:
A. G. MCCLINTOCK,
304 West 20th Street,
Cheyenne, Wyoming.

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BRIEF OF AMICI CURIAE, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, MID-CONTINENT OIL AND GAS ASSOCIATION AND NEW MEXICO OIL AND GAS ASSOCIATION.

This brief of *amici curiae* is filed on behalf of the Rocky Mountain Oil and Gas Association by the attorneys indicated as members of its Legal Committee, the Mid-Continent Oil and Gas Association by the Chairman of its Public Lands Committee, and by the New Mexico Oil and Gas Association by the Chairmen of its Legal and Public Lands Committees. The Rocky Mountain Oil and Gas Association, The Mid-Continent Oil and Gas Association, and the New Mexico Oil and Gas Association and the membership thereof consisting, respectively, of about 2,300,

8,500, and 500 oil and gas companies and private individuals are not directly involved in the present litigation, but are vitally concerned with the outcome of this case because it will not only directly affect the practical operation of the Mineral Leasing Act as well as the stability of leasehold titles under Public Domain leases but will also materially affect the economic and property interests of the members of said Associations by reason of their large holdings, as lessees, of Federal Oil and Gas Leases. Because of the extreme importance of the issues involved and because of their large holdings of Public Domain Leases, the said Associations on behalf of their membership, respectfully request permission to file this brief as *amici curiae*. Written consent of all parties to the case has been obtained and filed with the Court.

STATEMENT OF FACTS.

On September 11, 1956, appellant's father filed application for an oil and gas lease (NM 027951) on an 80-acre tract of public land. On that date an adjoining 40-acre tract was under application for lease filed by Thomas Connell. Also on September 11, 1956, but later in the day, Vincent Cuccia and George E. Conley filed a joint application for a lease on both the 80-acre and 40-acre tracts. Thereafter, and in the following order, the Manager of the Santa Fe Land Office (1) issued a lease on the 40-acre parcel to Connell, (2) issued a lease on the 80-acre parcel to Boesche, (3) rejected Cuccia and Conley's application.

Cuccia and Conley appealed from the Manager's decision to the Director of the Bureau of Land Management. By decision of January 9, 1959, the Director reversed the Manager's decision, holding that the Manager erred in issuing the Boesche lease and that the Boesche lease should be cancelled for failure to comply with that portion of

43 CFR 192.42(d) that "No offer [to lease] may be made for less than 640 acres except * * * where the land is surrounded by land not available for leasing under the Act."

Boesche appealed to the Secretary of the Interior, who by decision of August 5, 1959, affirmed the Director's decision and directed cancellation of the Boesche lease.

Appellant filed timely suit in the United States District Court for the District of Columbia and that court by its judgment dated November 23, 1960, upheld the authority of the Secretary to cancel Boesche's lease by administrative action.

The appellant appealed to the United States Court of Appeals for the District of Columbia Circuit. By *per curiam* opinion dated November 16, 1961, the Circuit Court affirmed the decision of the District Court.

Appellant's petition for a Rehearing *en banc* was granted by the District of Columbia Circuit and the November 16, 1961, *per curiam* judgment was vacated and set aside. After the Rehearing the Court *en banc per curiam* order reinstated its November 16, 1961, judgment.

ARGUMENT.

The Secretary of the Interior Has No Authority to Cancel Oil and Gas Leases by Administrative Action for Failure of the Lessee to Comply with a Departmental Regulation.

The Secretary of the Interior has directed the cancellation of the oil and gas lease issued by him to Boesche November 15, 1957, effective December 1, 1957, on the ground that Boesche's application for the lease was in violation of a Departmental regulation. The authority of

the Secretary to cancel the lease is now before this Court. If the Secretary possesses the authority to cancel oil and gas leases, that authority must be found, expressly or by necessary implication, in the Act under which the Secretary is authorized to grant oil and gas leases. The Act of Congress here under consideration is the Mineral Leasing Act of 1920, as amended.[1] A careful reading of the Act will disclose that Section 31[2] contains the only provision pertaining to "cancellation by the Secretary of the Interior"; no other provision of the Act contains similar words, or words of similar meaning and effect. Further, the provision for cancellation by the Secretary is so clear and explicit as to be beyond serious dispute. For this reason the Secretary asserts that the authority to annul and cancel oil and gas leases granted pursuant to the Act may be found in Rev. Stat. 441, 5 U.S.C. 485, enacted by Congress before the turn of the century, and by various statements of this Court to the effect that such statute vests him with that superintending and supervising power which will enable him to do justice.

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1. 30 U.S.C. 181 *et seq.*

2. 30 U.S.C. 188, which provides in part as follows:

"Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and cancelled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; * * *

"Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. * * *"

Rev. Stat. 441 provides in pertinent part only that "The Secretary of the Interior is charged with the supervision of public business relating to * * * public lands * * *." That the Secretary does possess broad powers under this statute cannot be denied; but such powers, however broad or inclusive, do not include the power to cancel oil and gas leases granted under the Mineral Leasing Act. Examination of numerous cases dealing with the Secretary's powers discloses three limitations: (1) the authority granted to the Secretary under Rev. Stat. 441 is *administrative* power only;[3] (2) it is *always* exercised in connection with another Act of Congress, which actually furnishes the framework *within which* the authority is to be exercised;[4] (3) the Secretary's authority ceases when the final administrative act[5] essential to the transfer of title has been performed and the legal title[6] to the interest disposed of passes from the United States.

The Secretary, to sustain his asserted authority must, of necessity, take the position that the cases support the view that it is the disposal of the *fee title* rather than of the *legal title* which terminates his authority and jurisdiction over the interest granted under any Act of Con-

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3. *United States* v. *George*, 228 U.S. 14, 20.

4. For example: The Homestead Act in *Johnson* v. *Towsley*, 80 U.S. 72, and *Lee* v. *Johnson*, 116 U.S. 48; the Swamp-Land Act in *Brown* v. *Hitchcock*, 173 U.S. 473; the Placer Mining Act in *Ickes* v. *Virginia-Colorado Dev. Co.*, 295 U.S. 639; the Timber and Stone Act in *Hawley* v. *Diller* 178 U.S. 476; the Donation Act in *Vance* v. *Burbank*, 101 U.S. 514.

5. *United States* v. *Schurz*, 102 U.S. 378; *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589; *Pan American Petroleum Corporation* v. *Pierson*, 284 F.2d 649; *Witbeck* v. *Hardeman*, 51 F.2d 450.

6. *Moore* v. *Robbins*, 96 U.S. 530; *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165; *Kern River Co.* v. *United States*, 257 U.S. 147.

gress; that in reference to this case, the United States leases the mineral estate but does not part with the fee title; that, consequently, his administrative power never ceases but continues to exist. The Secretary's construction is based upon cases involving *equitable*[7] claims on the public domain, rather than cases involving grants of legal title.

Such a construction of Rev. Stat. 441 was unknown to the Sixty-Sixth Congress when the Leasing Act was being considered. The history of the Act unequivocally shows that the power to cancel a lease was not only to be limited, but denied altogether except through judicial proceedings. In discussing the matter Senator Lenroot said:

> "I should like to remind both Senators (Smoot and McKellar) that *the Secretary of the Interior has no right or authority under the bill to ca ! a lease. It can only be canceled by judicial proceedings and a forfeiture* * * *"[8] (Emphasis supplied)

The Congressional Record further shows that Mr. Anderson attempted to insert a provision for cancellation and forfeiture without court proceedings in cases of fraud:

> "*Mr. Anderson*: Mr. Chairman, I move to strike out the last word. I want to ask the Chairman of the Committee a question. The provision beginning on line 6, page 6 provides:

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7. For example: A homestead entry in *Harkness & Wife* v. *Underhill*, 1 Black 316, and in *Orchard* v. *Alexander*, 157 U.S. 372; the correction of an erroneous survey prior to patent in *Knight* v. *United Land Association*, 142 U.S. 161; a timber land entry in *Hawley* v. *Diller*, 178 U.S. 476; a forest reserve land selection in *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; a lode mining claim in *Cameron* v. *United States*, 252 U.S. 450.

8. 58 Congressional Record, page 4169 (1920).

'any interests held in violation of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General' and so forth.

I take it that under that language the holding is valid and any operations conducted under it would be valid until after action brought by the United States. Am I correct in my construction of the language?

Mr. Sinnott: That would relate to a lease, but not to a permit. The secretary has certain rights under a permit, but after the permit is merged into a lease, then it will take court action.

Mr. Anderson: Well, Mr. Chairman, I want to ask what was the reason for that sort of provision? Ordinarily a lease would be void ab initio, but here you put the entire burden on the government to proceed to forfeit the lease before anything can be done in the way of showing fraud.

Mr. Sinnott: It is in recognition of that legal, or equitable principle that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured."[9]

Mr. Anderson's motion was defeated, and the Act as passed made no provision for cancellation of leases by the Secretary under any circumstances except through court proceedings instituted by the Attorney General. Thus it can be seen that at the time of passage of the Act the framers were purposely limiting the power of the Secretary to the area of determination prior to issuance of the lease.

The Act was amended in 1935 to allow the Secretary to cancel any lease issued after August 21, 1935, *for failure of the lessee to comply with the terms of the lease.* This is the only power that has ever been granted the Secretary to cancel a lease by administrative action.

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9. 58 Congressional Record, page 7604 (1920).

Rev. Stat. 441, 5 U.S.C., Sec. 485, has absolutely no relevance or applicability to the question presented here. Whatever authority the Secretary possesses in matters involving oil and gas leases must be measured exclusively by the Mineral Leasing Act, since that is the act which authorizes the exercise of administrative authority by the Secretary in the area of oil and gas leasing.[10] Without the Mineral Leasing Act the Secretary has no authority with respect to oil and gas leasing.[11] With the enactment of the Mineral Leasing Act went a delegation of administrative power to the Secretary to administer the grant of leases authorized by that Act.[12] Section 1 (30 U.S.C., Sec. 181) of the Mineral Leasing Act, provides for disposition of deposits of oil and gas and lands containing such deposits. Section 37 (30 U.S.C., Sec. 193) provides that such disposition shall be "only in the form and manner provided in this Act." The disposition is to be by means of leases rather than by patents, as formerly.

> "The passage of the leasing act of February 25, 1920, was the enactment into law of a broad and compre-

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10. See 3 Sutherland's Statutory Construction (3d Ed.), Sec. 5822, p. 117, where it is said "* * * The rule of *expressio unius exclusio est alterius* may be used advantageously in some cases in determining whether a statute should be construed as mandatory or permissive. As applied in this connection the rule is that if a statute provides one thing, a negative of all others is implied. Where a statute granted authority to do a thing and prescribed the manner of doing it, *the rule was clearly set out that the provision as to the manner of* doing the thing was mandatory even though the doing of it in the first place was discretionary." Citing *Kansas City, Mo.*, v. *J. I. Case Threshing Machine Co. et al.*, 87 S.W.2d 195, Mo., 1935.

11. *Clyde* v. *Cummings*, 101 Pac. 106, 108, Utah, 1909: "* * * the Secretary of the Interior has no authority under his general power of supervision and control of the public domain to lease any part of it, unless authorized to do so by an act of Congress."

12. See Section 32 of the Act, 30 U.S.C., Sec. 189.

hensive plan of general application by which an entire new system respecting the disposition of lands and deposits of minerals beneath the surface owned by the United States and valuable for certain specified minerals was adopted." *E. M. Harrison*, 49 L.D. 139, 144.

A new system of disposal was adopted but the legal principles established continue to govern. Among these is the principle that the Secretary's jurisdiction over the interest granted terminates when the legal title passes. By the issuance of an oil and gas lease the Secretary has performed the last act required of him to vest in the lessee the legal title[13] to the leasehold estate granted[14] and, upon performance of this last act in disposing of the leasehold estate, administrative power to annul or cancel ends and judicial power begins. *Moore* v. *Robbins*, 96 U.S. 530; *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165; *Kern River Co.* v. *United States*, 257 U.S. 147; *Bell Oil & Gas* v. *Wilbur*, 50 F.2d 1070; *Pan American Petroleum Corporation* v. *Pierson*, 284 F.2d 649.[15] The *Noble*

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13. *Ortiz* v. *Manning*, 82 P.2d 897, 898, Ariz. 1938: "A lease from the government undoubtedly is a legal title."

14. *R. B. Whitaker et al.*, 63 I.D. 124, 125: "In granting the lease * * * the Secretary of the Interior disposed of the entire oil and gas leasehold estate in the land."

15. Accord: *United States* v. *Schurz*, 102 U.S. 378: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result at some stage or other of the proceedings their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed."; *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 593: "In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed." See also *Parcher* v. *Gillen*, 26 L.D.

and *Kern River* cases are particularly significant in that the legal title principle was held fully applicable where the property right granted by the government was only a right of way, a lesser interest than the full fee simple estate.

The courts have recognized that this principle applies to oil and gas leases granted under the Mineral Leasing Act. The U. S. Court of Appeals for the D. C. Circuit, held in *Bell Oil & Gas Co.* v. *Wilbur*, 50 F.2d 1070, that the Secretary was governed by Sec. 31 of the Mineral Leasing Act and had to go to court to secure cancellation of an oil and gas lease, stating:

> "It is unnecessary for us to enter into any discussion as to the action of the Secretary, since we are compelled to dispose of the case on another ground, namely that the plaintiff has an adequate remedy at law. The Secretary, under the terms of the Act, has no power of his own fiat to cancel these leases. He is required to go into a District Court of the United States to accomplish that result by a proceeding in equity."[16]

34, 42: "The true rule drawn from an examination of all the authorities is that the jurisdiction of the land department ceases where the jurisdiction of the courts commence, viz.: when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights."

16. Accord: *Hodgson* v. *Midwest Oil Company*, 297 Fed. 273, affirmed 17 F.2d 71, 269 U.S. 534, recognized that the issuance of an oil and gas lease (being the highest muniment of title permitted under the Mineral Leasing Act) was no different in principle from the award of a patent (being the highest muniment of title permitted under the several Acts of Congress authorizing the issuance of patents), saying, 297 Fed., at page 276: "The analogy seems to be perfect." In *Witbeck* v. *Hardeman*, 51 F.2d 450, affirmed 286 U.S. 444, the court said at page 452: "Under the Leasing Act the land of the United States is not to be

The Department of the Interior has held to the same effect. In *The Melish Consolidated Placer Oil Mining Co.* v. *Testerman*, 53 I.D. 205, the Assistant Secretary said, at page 207:

> "Under the acts under which the award and lease to Testerman and his co-lessees were granted, the department had full power to determine all questions of fact and law essential in properly making such awards and granting leases pursuant thereto. The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts (Sec. 31, Act of February 25, 1920). Jurisdiction of the department to review his action in granting it ceased."

The Court below cites *McKay* v. *Wahlenmaier*, 226 F.2d 35, as authority for the proposition that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. The case does not support such proposition. There, the Secretary had determined that all applications filed before a certain date would be considered simultaneous filings and a drawing would be held to determine the priority of applicants. Among the applicants were Wahlenmaier, Culbertson, Irwin, and Culbertson & Irwin, Inc., a corporation of which Culbertson was President and Irwin was Vice-President. The drawing was held and Culbertson's

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conveyed by patent, but leased, so that the proprietory interest of the United States in the land never ceases. Nevertheless, the lease is the final action of the land department in disposing of the land, and in this respect is analogous to a patent. The general powers of the Land Department in administering this law are just such as are exercised in administering other land laws, and exactly the same necessities exist for judicial review of frauds on or in the department, or mistakes of law, or excesses of the limits of the authority, as arose in reference to the grants of patents, and similar remedies sought to apply."

name was drawn first; Wahlenmaier's name was drawn second. After a lease was issued to Culbertson, Wahlenmaier protested, calling the Secretary's attention to the facts surrounding the Culbertson and Irwin applications. The Secretary found Culbertson had violated the regulations requiring disclosure of his interests as a shareholder in his corporation's federal leases but refused to cancel Culbertson's lease. Wahlenmaier filed suit in which he asked that the Secretary be directed to cancel the lease to Culbertson and issue one to him. The relief was granted and affirmed on appeal. This brief statement is sufficient to show that the issue of administrative cancellation was not raised by either party to the lawsuit. The authority of the Secretary to cancel the lease was assumed by both parties. It was not before the court in any adversary sense inasmuch as Culbertson was not a party to the suit. It was not argued. It was not decided. That case is neither authority nor precedent for anything at issue in this case.

The court below, which also decided the *Wahlenmaier* case, had this to say about it:

> "We think McKay v. Wahlenmaier, 226 F.2d 35, does not decide that administrative cancellation was available to the Secretary in the present case. There we held that the Culbertson lease should be cancelled, and ordered the Secretary to cancel it. We did say also that the Secretary could have cancelled in the situation there presented, but the fact is the cancellation was ordered by the court as the result of a judicial proceeding, and not on review of administrative action."[17]

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17. The Department of the Interior itself, in *Lynn Nelson et al.*, 66 I.D. 14, expressed the same view, stating that in *Wahlenmaier* "The Court ordered cancellation of the lease."

The foregoing is an excerpt from the opinion of October 3, 1957, in *Seaton* v. *The Texas Company* which was later withdrawn following a rehearing and a second opinion reported in 256 F.2d 718. The withdrawal does not invalidate the court's comments on its own case. Further, so far as the *Seaton* case is applicable here, both opinions hold that administrative cancellation of the lease involved was not valid administrative action.

The Secretary asserts that the administration of the Mineral Leasing Act will be jeopardized unless the Secretary can cancel administratively oil and gas leases issued by him under the Act. Numerous "statistics" have been advanced but no facts demonstrating any inability to correct errors have been presented. Furthermore, this case does not involve acquired lands, Indian, Naval Petroleum Reserve or Outer Continental Shelf lands which Appellee has included in his "statistics." Nor does this case involve Taylor Grazing Act permits, transmission line easements and "other myriad of instances". This case only involves a lease granted to Boesche under the authority of the Mineral Leasing Act. The absence of Departmental authority to cancel patents and other grants has not hampered the administration of the other land grant acts even though much more of the public lands have been sold and patented than have been leased for oil and gas purposes.[18]

In the Secretary's Memorandum filed in this Court, urging certiorari in this case, at page 2 thereof, he states

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18. More than one billion acres of the original Public Domain has been included in sales and grants to war veterans, states, railroads, homesteaders and others. About 287 million acres have been included in homestead patents alone. *The Yearbook of Agriculture*, 1958, published by the U. S. Government Printing Office, Washington, D. C., p. 43; *The World Almanac*, 1961, p. 277.

that there were 1,129 administrative cancellations of leases during the three year period ending June 30, 1960. However, most of such so-called cancellations are not cancellations at all in the real sense of such term but amount to mere declarations of termination such as is involved when a lease terminates for failure of lessee to make timely payment of a rental, or where such "cancellation" is made merely to clear the land office records in cases where a lease has been issued on land not owned by the United States or where a lease has been issued inadvertently on lands already under lease. In such cases cancellation is not involved.[19] However, once a lease has been issued the Secretary must comply with the provisions of the Mineral Leasing Act, and cannot cancel the lease by administrative action except as specifically provided in Section 31 of the Act. Moreover, continued and repeated administrative cancellations, alleged to have occurred since 1920, cannot thwart the plain purpose of a valid law.[20] As was pointed out by the court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 103 F. Supp. 569, affirmed 343 U.S. 579, it is difficult to follow the argument

> "that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition

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19. See for instance *L. N. Hagood,* A-26226 (October 5, 1951), reported in Gower's Federal Service SO-1951-48, where the Solicitor stated: "The decisions below stated that the appellant's lease should be cancelled. This terminology is technically incorrect, since the word 'cancellation' connotes the annulment or avoidance of something which has been in force. As pointed out above, Mr. Hagood's lease was void from its inception, and was thus incapable of cancellation. Accuracy is better served by a declaration that the Hagood lease is null and void."

20. See *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32.

clothe a later unauthorized act with the cloak of legality. Apparently, according to his theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree."

If the Secretary who issues federal oil and gas leases may also cancel the same at his own caprice, the practical operation of the Mineral Leasing Act as well as the stability of leasehold title, so important in promoting the prompt and efficient development of the oil and gas deposits in public lands, is most seriously impaired. As pointed out by the court in *Pan American Petroleum Corporation* v. *Pierson et al.*, 284 F.2d 649, at page 655, the exploration for oil and gas is costly. The drilling of wells requires substantial financial risks, and the expense of putting those wells on production and marketing the product is burdensome. If the continued existence of the granted leasehold estate is dependent upon the fluctuating policies of the Secretary, without any limitations safeguarding the vested interests of the lessee, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed.

CONCLUSION.

It is clear that the Secretary of the Interior, by purporting to cancel the Boesche lease by administrative action, exceeded the authority granted to him by Congress and violated the provisions of Section 31 of the Mineral Leasing Act.

It is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

SCOTT A. PFOHL,
Rocky Mountain Oil and Gas Association,
Chairman, Legal Committee,
Denver Club Building,
Denver, Colorado,

NORBERT E. PROCTER,
Mid-Continent Oil and Gas Association,
Chairman, Subcommittee on Public Lands Matters of Legal Committee,
101 University Blvd.,
Denver, Colorado,

HOWARD C. BRATTON,
New Mexico Oil and Gas Association,
Chairman, Legal Committee,
Hinkle Building—P. O. Box 10,
Roswell, New Mexico.

Of Counsel:

A. G. MCCLINTOCK,
Attorney at Law,
304 West 20th Street,
Cheyenne, Wyoming.

For The Rocky Mountain Oil and Gas Association:

T. J. FILES, Attorney,
Pan American Petroleum Corporation,
Casper, Wyoming,

JOHN S. MILLER, Attorney,
Amerada Petroleum Corporation,
Tulsa, Oklahoma,

WILLIAM T. SCHWARTZ,
Attorney at Law,
The Consolidated Royalty Oil Company,
Casper, Wyoming,

WALLACE L. CAMPBELL,
Attorney at Law,
Akolt, Turnquist, Shepherd & Dick,
Denver, Colorado,

V. P. CLINE, Attorney,
California Oil Company,
Denver, Colorado,

CLINTON D. VERNON,
Attorney at Law,
Salt Lake City, Utah,

JAMES S. HOLMBERG,
Attorney at Law,
Denver, Colorado,

ELMER J. JACKSON, Attorney,
Kansas-Nebraska Natural Gas Co.,
Hastings, Nebraska,

J. E. HORIGAN—Denver, Colorado,
W. R. HARRISON—Midland, Texas,
Attorneys,
Socony Mobil Oil Company, Inc.,

A. T. SMITH, Attorney,
Continental Oil Company,
Denver, Colorado,

CHARLES LUEDKE,
Attorney at Law,
Billings, Montana,

J. P. GREVE, General Attorney,
Sunray DX Oil Company,
Tulsa, Oklahoma,

JACK C. OSBORNE, Attorney,
Northern Natural Gas Producing Company,
Omaha, Nebraska,

ROBERT D. POULSON, Attorney,
The Superior Oil Company,
Denver, Colorado,

JOHN CRAWFORD, JR., Attorney,
Mountain Fuel Supply Company,
Salt Lake City, Utah,

C. W. MCDERMOTT, Attorney,
Colorado Oil and Gas Corporation,
Denver, Colorado,

WALTER E. WILL, Attorney,
Texaco, Inc.,
Denver, Colorado,

CLAIR M. SENIOR,
Attorney at Law,
Senior & Senior,
Salt Lake City, Utah.

For The New Mexico Oil and Gas Association:

HOWARD C. BRATTON,
Chairman of the Public Lands Committee,
P. O. Box 10,
Roswell, New Mexico,

L. C. WHITE,
Chairman of the Legal Committee,
Bishop Building,
Santa Fe, New Mexico.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR OF THE ESTATE OF F. W. C. BOESCHE, DECEASED, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law (R. 22–25) are unreported. The opinion of the court of appeals (R. 27–29) is reported at 303 F. 2d 204, 206.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1961 (R. 29). An order vacating the judgment was entered February 21, 1962 (R. 35). On June 15, 1962, the court of appeals reinstated the original judgment of November 16, 1961 (R. 36). The petition for a writ of certiorari was filed on August 14, 1962, and granted on November 5, 1962. 371 U.S. 886.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority to cancel an oil and gas lease issued in violation of the Department's regulations and in derogation of a competing applicant's statutory preference rights.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are printed in the Appendix A, *infra*, pp. 43–49.

STATEMENT

Section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. 226, authorizes the Secretary of the Interior to grant oil and gas leases on lands in the public domain. If, as in this case, the lands are not within a known geologic structure, "the person first making application for the lease who is qualified to hold a lease under [the statute] shall be entitled to a lease of such lands without competitive bidding."[1] The regulations provide that an offer for such a noncompetitive lease "may not be for less than 640 acres except * * * [w]here the land is surrounded by lands not available for leasing * * *." 43 C.F.R. 192.42(d). If an offer is for less than 640 acres and is not within the exception, the regulations direct that the "offer will be rejected and * * * will afford the applicant no priority * * *." § 192.42(g)(1).

[1] Leases of lands within known geologic structures are awarded by competitive bidding to the qualified bidder offering the highest bonus.

In September 1956, an 80-acre tract in Oklahoma became available for noncompetitive leasing. Adjoining it was a 40-acre tract which was also available for leasing but for which one Connell had already filed an application. On September 11, 1956, the petitioner [2] filed an offer to lease the 80-acre tract. Minutes later, Vincent Cuccia and George E. Conley jointly applied for a lease of the entire 120 acres. On December 1, 1956, in action not questioned in these proceedings, a lease on the 40-acre tract was issued to Connell on his prior application, thus leaving only the 80-acre tract available (R. 24).

On November 15, 1957, the Manager of the Santa Fe Land Office of the Bureau of Land Management issued a lease on the 80-acre tract to petitioner. In due course, on January 24, 1958, the Manager notified Cuccia and Conley of that action and the consequent rejection of their application (R. 11, 24). The notice of rejection advised them of their right to appeal the decision to the Director of the Bureau in accordance with the regulations. An appeal was duly taken within the 30-day period allowed by the regulations. 43 C.F.R. (1962 Supp.) 221.1–221.2. The Director reversed the Manager's decision, holding that the failure of the petitioner's application to include the adjoining 40-acre tract made the offer inadequate under the minimum-acreage regulation (§ 192.42(d)); required its rejection and the denial of any priority

[2] Petitioner is actually the administrator of the estate of the original applicant, but for simplicity we will ignore the distinction.

to petitioner (§ 192.42(g)(1)); and thus made Cuccia and Conley the "first" qualified applicant entitled to the lease under Section 17 of the Act. He accordingly directed, subject to petitioner's right of appeal to the Secretary, that the lease issued to petitioner be canceled and a lease for the tract be issued to Cuccia and Conley (R. 12–14). On petitioner's timely appeal, the Secretary (through his delegate, the Deputy Solicitor) affirmed the decision of the Director (R. 15–18).

Petitioner filed a complaint in the district court for the District of Columbia to review the decision of the Secretary (R. 4–9). The district court granted summary judgment for the respondent, upholding both the Secretary's interpretation of the minimum-acreage regulations and his power to cancel a lease erroneously issued to one of two competing applicants in order to award it to the other (R. 22–25). The court of appeals affirmed (R. 27–29). On a claim of a conflict with a prior decision of the same court as to the Secretary's authority administratively to cancel leases, the court granted a petition for rehearing *en banc* (R. 35), but after hearing reargument it vacated the rehearing order and reinstated the original judgment (R. 36).

The petitioner filed a petition for certiorari asserting a conflict with the decision of the Tenth Circuit in *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649, certiorari denied, 366 U.S. 936. Agreeing that the decision was "squarely in conflict" with the

Pan American case and that the question was important, the respondent joined in urging that certiorari be granted. This Court granted certiorari but limited the issue to the question of the Secretary's power to cancel the lease because of the noncompliance of the application with the minimum-acreage regulation, thereby excluding the question, sought to be preserved by the petition (see Pet. 2, n. 1), whether the application did comply with the regulation (R. 37).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner's lease was cancelled by the Secretary, because the application was defective, in order to give effect to the declared policy of Congress to have mineral leases awarded to the first qualified applicant. Mineral Leasing Act of 1920, Section 17, 30 U.S.C. 226. Since petitioner's application was defective, the first qualified applicants were Cuccia and Conley jointly, whose application was pending at the time the lease was erroneously issued to petitioner. The Secretary acted as a result of the direct appeal by Cuccia and Conley from the action of the manager of the Santa Fe office denying their application, taken within the time allowed by departmental regulations. The exact question presented, therefore, is whether the Secretary had the power to cancel petitioner's lease, under those circumstances and for the reasons stated, or was powerless to correct the error and

award the competing applicants the lease to which they were jointly entitled.[3]

We submit that the Secretary has power to cancel a lease issued on an application which fails to comply with the controlling regulations. We need not find the power in the Mineral Leasing Act of 1920, as petitioner implies. The source of the power is the Secretary's long-standing statutory authority and duty to manage the public domain. The management of the public domain, we point out, requires thousands of recurring actions to be taken daily upon claims, surveys, entries, and applications of various sorts, including applications for leases. The actions are administrative routine, taken in local offices all over the country. Mistakes inevitably occur, like the error in the Santa Fe office in the present case. As we show below, the Secretary's power to correct such mistakes not only has been recognized in repeated decisions in analogous cases, but is essential both to

[3] We may have been guilty of overgeneralization in asserting in our memorandum in response to the petition for certiorari that the decision below is in square conflict with *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649, certiorari denied, 366 U.S. 936. The reasoning in the two opinions is diametrically opposed. Insofar as *Pan American* case rests upon the theory that Section 31 of the Mineral Leasing Act of 1920 withdrew from the Secretary of the Interior all power to cancel leases administratively, there may be no way of reconciling the decisions. In the *Pan American* case, however, the cancellation would not have been for the purpose of according a conflicting applicant his statutory priority, and the administrative proceedings involved were not the result of an appeal by another applicant from the denial of his application taken within the period allowed by departmental regulations.

protect the public interest and also to assure other applicants the benefit of their statutory rights.

This case cannot be distinguished from other established examples of the Secretary's power of cancellation upon the ground that a lease, like a land patent, confers legal title. The true distinction, we submit, is between a permanent conveyance of interests in a parcel of land, which puts it out of the public domain, and a transfer of a lesser interest, like a lease, which leaves the United States with continuing ownership and the Secretary with the responsibility for management.

The Secretary's power to cancel, contrary to petitioner's principal argument, was not withdrawn by Section 31 of the Mineral Leasing Act of 1920. Its provisions for cancellation and forfeiture look to breach of the conditions of the lease or violations of statutory requirements occurring after the lease was issued. They are in no way concerned with the correction of mistakes occurring in action upon the application, certainly not with those raised upon appeal from the denial of conflicting applications. The Secretary has exercised the challenged power for more than 40 years and Congress, despite every opportunity if it were dissatisfied, has declined to interfere.

The administrative power to cancel a lease under these circumstances is necessary to give effect to the rights of competing applicants. In the absence of some special arrangement a local land office takes up the applications on file in chronological sequence. It would be utterly impracticable to try to hold a formal

hearing upon each of thousands of applications, with notice to conflicting claimants and with the opportunity for each to be heard and appeal. The manager of the local office and his assistants act upon each application in turn. If the land is available, if the applicant is qualified, and if the application appears to conform to the regulations, a lease will issue. In due course the manager will come to each conflicting application filed before the lease was issued. He may realize his own mistake. More likely, he will find that none of the later applicants was the first qualified applicant and will, therefore, deny their applications. The notice of denial will give the later applicant his first formal notice that he has occasion to investigate and show, if he can, that he was in fact the first qualified applicant, and to appeal on this ground to the Director of the Bureau of Land Management and the Secretary of the Interior. Thus, given the nature of the land office's business, the existence of some power of cancellation, at least for as long as timely competing applications[4] are pending, is essential to secure the rights of competing applicants. In the present case, the correction also advances the public interest by giving effect to regulations designed to check the splitting up of tracts into small bits and pieces in the hands of separate lessees, a development which facilitates frauds, hinders the orderly exploitation of oil

[4] We use the term "timely conflicting applications" to define those filed before the lease is issued. Subsequent applicants are rejected by the Department, without permitting the late-filer to contest the validity of the lease issued.

resources, and increases paper work and problems of supervision.

The Department's actual management of lands available for leasing recognizes these practicalities. Although broader power exists, the practice has been to cancel leases for the present kind of non-conformity with the regulations only where the defect was pointed out on appeal from denial of a timely competing application. The departmental regulations, we will show, both establish and reflect the practice. In net effect the legal situation in this case is therefore the same as if the departmental regulations explicitly provided that all leases issued by a local land office are subject to review by a superior official for defects in the application or qualifications of the applicant until the Department has disposed of all timely competing applications. There can be no doubt of the power of the head of one of the busiest departments to reserve for a reasonable period the right to review the action of his subordinates either on direct appeal or, as here, on appeal from the denial of a timely competing application.

THE SECRETARY OF THE INTERIOR HAD POWER TO CANCEL PETITIONER'S LEASE

A. THE SECRETARY, INDEPENDENTLY OF THE MINERAL LEASING ACT, HAS ADMINISTRATIVE POWER TO CANCEL A LEASE ISSUED BY MISTAKE

For well over a century, the Secretary of the Interior has been "charged with the supervision of public business relating to * * * [p]ublic lands, in-

cluding mines." R.S. § 441; 5 U.S.C. 485.[5] He is directed to "perform all executive duties * * * in anywise respecting * * * public lands [of the United States]." R.S. § 453; 43 U.S.C. 2.[6] And he is expressly "authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of * * * [the Title dealing with public lands] not otherwise provided for." R.S. § 2478; 43 U.S.C. 1201.[7] See *Best* v. *Humboldt Placer Mining Co.*, No. 52, this Term, decided January 14, 1963. Clearly, this sweeping grant of authority is a sufficient basis for the Secretary's practice of reviewing, and cancelling, the erroneous issuance of a mineral lease. We need look no further for an affirmative grant of power.[8] As this court said in *Cameron* v. *United States*, 252 U.S. 450, 461, invoking these provisions to sustain the Secretary's cancellation of a mining location claim:

> True, the mineral land law does not in itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some

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[5] This provision may be traced to the Act of March 3, 1849, 9 Stat. 395, which created the Department of the Interior and transferred to it jurisdiction over the General Land Office.

[6] This provision derives from the Act of April 25, 1812, 2 Stat. 716, which created the General Land Office, subsequently brought under the jurisdiction of the Secretary of the Interior. See note 5, *supra*.

[7] The provision originates in the Act of September 28, 1850, 9 Stat. 520.

[8] The statutory basis of the power claimed by the Secretary immediately distinguishes the cases relied on by petitioner. Compare, *e.g.*, *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585.

> direction to the contrary, the general statutory provisions before mentioned vest it in the land department. * * *

The same power of cancellation or correction has been recognized in the Secretary, or his predecessor, the Commissioner of the General Land Office, in a variety of related situations. Thus, in *Harkness & Wife* v. *Underhill,* 1 Black 316, *Lee* v. *Johnson,* 116 U.S. 48, and *Orchard* v. *Alexander,* 157 U.S. 372, the administrative cancellation of homestead entries was upheld. In *Brown* v. *Hitchcock,* 173 U.S. 473, the Court affirmed the rescission of a selection list previously approved by the Secretary. And the same power of administrative cancellation has been sustained as applied to an erroneous survey, *Knight* v. *United States Land Association,* 142 U.S. 161, 181; a timber land entry, *Hawley* v. *Diller,* 178 U.S. 476, 488–490; and a lieu land selection, *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316.

These old cases show the venerable age of the rule that the Secretary of the Interior retains power to determine the validity of claims on the public domain of the United States. The principle has lost none of its vitality through the years. Its present force is attested by this Court's recent decision in *Best* v. *Humboldt Placer Mining Co., supra,* in which the "plenary authority" of the Department of the Interior to resolve questions relating to the validity of mineral claims is re-affirmed. As *Best* points out, the Department of the Interior performs a "special role" in

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the administration of the public lands and acts as a "special tribunal," so much so that a court with jurisdiction to decide should defer to the administrative process.

The power to cancel administrative action taken by mistake, when it relates to the management of land rather than a permanent conveyance, is essential to protect the public interest and give effect to statutory policies. The management of the public domain involves thousands of recurring decisions, taken daily, upon claims, surveys, entries and applications of various sorts, including applications for leases. Scattered local land offices, headed by a manager keep the tract books, serial registers and other records. They initially handle all transactions. In dealing with lands where there may be oil and gas and other minerals covered by the Mineral Leasing Act, the land office functions as a general real estate manager, whose duties include processing applications, issuing leases, approving assignments and extensions of leases, enforcing the terms of the leases, recording of the termination of leases, and similar matters.

In connection with the issuance of leases, applications must be checked to see that the land is leasable and that the applicant has satisfied the requirements of the regulations and is the party entitled to the lease. The magnitude of the mineral leasing program alone is indicated by the fact that on June 30, 1960, there were outstanding 139,000 leases supervised by the Department of the Interior under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30

U.S.C. 181 *et seq.*, which covered 113,000,000 acres. The total number of outstanding leases supervised by the Department under all programs—public lands, acquired lands, Indian, Naval Petroleum Reserve, and Outer Continental Shelf—was 159,000, covering 125,000,000 acres.

In many instances there are multiple applications for the same land, sometimes hundreds for a single tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the New Mexico office alone,[9] many of which affected the same acreage. In the normal treatment of the applications, there is no adjudication between adverse parties. The local office takes up the applications one at a time and reaches a managerial decision whether all requirements have been met by the particular applicant or, for a reason the manager states, the application should be rejected. In a program of this magnitude, it is inevitable that some mistakes will be made. In the three-year period ending June 30, 1960, there were 1,129 administrative cancellations out of the total of 54,000 leases issued during that period. While no statistics are available for the period subsequent to June 30, 1960, the Department of the Interior advises us that the annual volume of leases and cancellations has not significantly altered in the last two years. In this list the leases were canceled for being issued (1) to other than the first qualified applicant; (2) for land in a prior oil and gas lease; (3) for lands in Indian reservations; (4) for lands patented

[9] This is the office in which the present case originated.

without reservation of oil and gas; (5) for lands in forest exchanges; (6) noncompetitively for lands in a known geologic structure; (7) for lands in a mineral entry; (8) for lands within a reservoir area; (9) for an area less in size than the minimum required by law; (10) where the offer to lease was withdrawn before the lease was issued; (11) through error in platting; (12) in conflict with a homestead entry; and (13) for other miscellaneous reasons.

It must be emphasized that the authority claimed is no broader than the necessities of practical administration. The Secretary claims no broad power to cancel any mineral lease for any cause. There is no suggestion of authority to forfeit leases validly issued because of subsequent violations by the lessee, except as expressly provided by statute.[10] The Secretary affirms only his responsibility to rescind leases *erroneously* granted, whether the error was fraudulently induced or resulted from inadvertence by his own subordinates. The claim, in short, is restricted to the correction of errors which affect the *initial validity* of the lease. Furthermore, for the purposes of this case, as we show below, it is necessary to establish only that a lease issued on a defective application can be cancelled by the Secretary upon the timely appeal of a competing applicant taken from the denial of his application.

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[10] As later noted, Section 31 of the Mineral Leasing Act of 1920, as amended in 1935 and 1946, permits administrative cancellation upon failure to comply with the lease conditions if the mineral value of the lease is still undetermined.

It is objected that the power of administrative cancellation, whatever it may have been with respect to "equitable" interests in land, such as homestead entries and the like, never survived the passing of "legal" title from the government to the private claimant, and certain land patent cases are cited in support of this proposition.[11] Accordingly, it becomes necessary to consider whether a mineral lease of the character here involved is governed, so far as the power of cancellation is concerned, by the "entry" cases or the "patent" cases.

At the outset, we submit that the real distinction drawn in the decisions of this Court is not between the passage of "legal" title and the conferring of an "equitable" interest. The true line is between a complete defeasance of title and a conveyance that transfers only a tentative, or limited or conditional right. So judged, the lease in suit plainly falls within the ambit of those cases which hold that the Secretary retains power to correct his own errors.

This is so not only because the interest transferred, being a mere lease, is something less than fee simple title. Beyond the limited nature of the interest conveyed, the lease granted under the Mineral Leasing Act is unusually restricted. Indeed, one of the objects of the new law, which replaced the old patent system, was to permit the United States to retain control over mineral lands after a lease was granted. As the House Committee on Public Lands noted in

[11] See cases cited at pp. 23–26 of Petitioner's Brief and p. 5, nn. 5 and 6 of the Brief for the Amici Curiae.

its report on the bill which became the Mineral Leasing Act of 1920 (H. Rep. 398, 66th Cong., 1st Sess., pp. 12–13):

> Deposits of oil and gas are now subject practically, to unlimited appropriaton under the placer-mining laws. The basic theory of all past conservation measures has been a leasing system of a limited area on payment of a royalty to the Government, thus reserving to the Government an owner's or less[or]'s interest in the property and reserving to it the right to prescribe rules and regulations against wasteful practices. * * *

The policy of retaining supervision over lands under lease, and over the leases themselves, is implemented in the statute. Thus, assignments and subleases must be approved by the Secretary. 30 U.S.C. 187. The Secretary, in the interest of conservation, may direct suspension of operations and production. 30 U.S.C. 209. The Secretary may require the lessee to operate under a cooperative or unit plan. 30 U.S.C. 226(e). In addition, 30 U.S.C. 189 authorizes the Secretary to prescribe necessary rules and regulations, and these further restrict the freedom of the lessee.

Under the regulations, the lessee may be compelled to drill or to pay compensatory royalty in the event of drainage. 43 C.F.R. 192.8. Cooperative or unit plans, as well as communitization and drilling agreements, are effective only when approved by the Secretary. 43 C.F.R. 192.20–192.23; 30 C.F.R. 226.8. The regulations also require the Secretary's approval of all transfers and assignments. 43 C.F.R. 192.40–

192.41. Finally, every detail of location, drilling and production is minutely regulated and the Secretary, through the Geological Survey, retains effective control over the lessee's operations from beginning to end. 30 C.F.R. Part 221.

The federal mineral lease very plainly does not give the lessee anything approaching the full ownership of a fee patentee; nor even does it convey an unencumbered estate in the minerals. Indeed, the government lessee acquires less than the homesteader whose entry is approved,[12] or the mining claimant whose location is perfected.[13] At all events, the issuance of a lease under

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[12] In *Orchard* v. *Alexander*, 157 U.S. 372, 383, it was said of a homestead entry:

> The party who makes proofs, which are accepted by the land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. * * * The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. * * *

[13] With reference to a mining claim, in *Wilbur* v. *Krushnic*, 280 U.S. 306, 316-317, the Court said:

> The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment * * *. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. * * *

the 1920 Act, unlike the granting of a patent, does not sever the government's connection with the land, or end its interest in the property affected. On the contrary, the Secretary retains control of both land and minerals, with the concomitant duty to supervise the administration of the parcel as a continuing portion of the public domain. It would seem to follow that, as continuing custodian of the public lands under lease and supervisor of the lease operations, he may, and in a proper case must, correct his own errors. *McKay* v. *Wahlenmaier,* 226 F. 2d 35, 40 (C.A.D.C.).

Recognition of the power to cancel leases does not license administrative abuses. Final action by the Department of the Interior has always been subject to judicial review. There is an appeal to the courts when the Secretary has acted beyond his authority. See, *e.g., Noble* v. *Union River Logging Railroad,* 147 U.S. 165. So also, when his decision is vitiated by fraud or misapplication of law. *Johnson* v. *Towsley,* 13 Wall. 72, 84; *Moore* v. *Robbins,* 96 U.S. 530, 535. But these are not the limits of judicial review. Today, at least, courts may, and do, inquire whether the administrative action is arbitrary, or capricious, or unsupported in the evidence. See, *e.g., Barash* v. *Seaton,* 256 F. 2d 714 (C.A.D.C.); *Seaton* v. *Texas Company,* 256 F. 2d 718 (C.A.D.C.); *Foster* v. *Seaton,* 271 F. 2d 836 (C.A.D.C.). The only condition is that court proceedings be initiated promptly. 30 U.S.C. (Supp. III) 226–2. There is accordingly no question of leaving the door open to high-handed or arbitrary cancellation.

B. THE MINERAL LEASING ACT OF 1920 DID NOT WITHDRAW THE SECRETARY'S PRE-EXISTING AUTHORITY TO REVIEW AND CORRECT ERRORS IN THE MANAGEMENT OF PUBLIC LAND

Petitioner contends that the Secretary's power to cancel grants affecting the public domain, whatever it may have been, was withdrawn, as respects oil and gas leases, by the Mineral Leasing Act of 1920. Except as expressly provided in the case of failure to comply with the terms of the lease before the mineral value of the land has been proved, he reads Section 31 of the Act as barring administrative cancellation and requiring judicial intervention. Petitioner's reliance on Section 31 is misplaced. That Section, and the other forfeiture and cancellation provisions of the statute, do not reach our question. They deal only with termination for breaches or violations occurring *after issuance,* not defects which invalidate initial issuance. The history, the text, and the practice relating to these provisions confirms our view.

The Mineral Leasing Act of 1920 was the belated Congressional response to growing alarm at the rapid depletion of petroleum reserves on the public domain. Public lands chiefly valuable for their oil deposits had been opened to entry as placer mining claims by the Act of February 11, 1897, 29 Stat. 526. In 1909, confronted with the critical situation, the President issued a proclamation withdrawing from further entry 3,041,000 acres of land in California and Wyoming. The idea was to withhold these lands until Congress could pass legislation in aid of conservation of petroleum resources on public lands. The

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validity of the executive order was challenged and upheld by this Court in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, again as impliedly authorized by the public land general statutes and history.

In the meantime, Congress had begun to wrestle with the problem. In May of 1914, the Committee on Public Lands of the House of Representatives favorably reported a mineral leasing proposal. See House Report No. 668, 63d Cong., 2d Sess., on H.R. 16136. This bill passed both houses but died in conference in the adjournment rush at the close of the 63d Congress. The new mineral leasing program was considered by each subsequent Congress until the Mineral Leasing Act of 1920 was finally enacted in the Second Session of the 66th Congress.[14]

Several committee reports show that Congress was preoccupied with special problems which have no bearing on the present suit. There was for example, much opposition from Westerners to replacing the mineral patent with a lease, thus making the government a perpetual landlord for the public domain. See, *e.g.*, the minority report filed with Senate Report No. 319, 64th Cong., 1st Sess. There was bitter fighting over the compromise of suits and claims

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[14] H.R. 406, 64th Cong., H. Rep. No. 17, 64th Cong., 1st Sess.; S. Rep. No. 319, 64th Cong., 1st Sess.

S. 2812, 65th Cong.; S. Rep. No. 116, 65th Cong., 1st Sess.; H. Rep. No. 563, 65th Cong., 2d Sess.; H. Conf. Rep. No. 1059 and H. Rep. No. 1138, 65th Cong., 3d Sess.; H.R. 3232, 65th Cong.; H. Rep. No. 206, 65th Cong., 2d Sess.

S. 2775, 66th Cong.; H. Rep. No. 398, 66th Cong., 1st Sess.; H. Conf. Rep. No. 600, 66th Cong., 2d Sess. S. 2775 is the bill that was enacted.

similar to that involved in *United States* v. *Midwest Oil Co., supra.* See S. Rep. No. 116, 65th Cong., 1st Sess., p. 6. Fears were voiced about the large oil companies obtaining a monopoly of the petroleum resources on the public domain. See H. Rep. No. 206, 65th Cong., 2d Sess. But the dominant theme of the debates is conservation through control. See, *e.g.,* H. Rep. No. 398, 66th Cong., 1st Sess., pp. 12–13. Congress was concerned lest the placer patent system encourage too rapid mining of petroleum resources today that the government, particularly the Navy, might need tomorrow. H. Rep. No. 206, *supra.*

The legislative history of the Act leaves the overwhelming impression that Congress intended to increase, not limit, the Secretary's control over the mineral lands of the United States. The House Report on the bill previously quoted (*supra,* p. 16) so indicates. The Report on an earlier version of the proposal confirms this purpose:

> The legislation provided for herein, it is thought, will go a long way toward the development of the West and of the natural resources of the West and at the same time reserve to the Government the right to supervise, control, and regulate the same, and prevent monopoly and waste and other lax methods that have grown up in the administration of our public-land laws. [H. Rep. No. 1138, 65th Cong., 3d Sess., p. 19.]

Accordingly, it would be surprising to find in the Act a withdrawal of the Secretary's power to cancel

erroneously issued leases. In fact, nothing in the statute disturbs the pre-existing law on this question.

As originally enacted, the Mineral Leasing Act contained several provisions dealing with cancellation or forfeiture. But none of these affects our problem. Indeed, all but one of the forfeiture provisions deal exclusively with breaches of the lease terms or violations of the Act or regulations occurring *after* a valid lease has issued.

Thus, disregarding the prohibition against drilling within 200 feet of the lease or permit boundary is declared to be ground for forfeiture, "to be enforced in appropriate proceedings in courts of competent jurisdiction." Sec. 16, 41 Stat. at 443. Other grounds for judicial cancellation included failure to comply with the provision of the Act granting rights of way for pipe lines through public lands, Sec. 28, 41 Stat. at 449, and breach of the conditions of the lease. Sec. 31, 41 Stat. 450. On the other hand, failure to "exercise due diligence" in prospecting subjected a prospecting permit to administrative cancellation. Sec. 26, 41 Stat. at 448.

The only partial exception to the scheme of the Act is Section 27, 41 Stat. at 448, which provides for judicial forfeiture of interests in excess of the maximum acreage allowances. This provision responds to the congressional fear that the mineral wealth of the country might be monopolized in the hands of the large oil companies. But, even here, the Act is less concerned with initial invalidity than with conduct after issuance which requires forfeiture. Thus, the

provision does not focus on excessive original grants to any one person, but rather on subsequent acquisitions and combinations that would defeat the holding limitations. In any event, the difficult and close questions involved in disentangling the various schemes through which excessive acreage might be combined under the same control are totally unlike the simple determination whether an administrative error of the kind here in question has been made, and it is not difficult to understand that Congress thought those decisions should be confided to the judicial process.

Read against this background, Section 31 of the Act, here relied on, does not reach our question. As originally enacted, it provided:

> That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

In a sense, this is, of course, a "catch-all" provision. But it is not addressed to administrative errors or to invalid leases. It presumes a lease validly issued and prescribes cancellation, at the suit of the Secretary,

when "the lessee fails to comply" with his obligations as such, whether imposed by the Act itself, by the regulations promulgated thereunder, or by the lease.

The bits of legislative history cited by petitioner (Br. 14–17) and the amici curiae (Br. 6–7), and the Secretary's communication in 1916 (Pet. Br. 14), do no more than reiterate the rule of Section 31, that forfeiture of a lease validly issued for misconduct by the lessee must be judicially declared. No one in the debates was concerned with administrative errors and their correction by cancellation. That subject was simply not discussed.

The forfeiture provision applicable to "prospecting permits," the predecessor of the present non-competitive lease on unproved land,[15] illustrates the point. Indeed, as already noted, Section 26 of the original Act permitted administrative cancellation of permits for failure "to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit." 41 Stat. at 448. It says nothing about cancelling a permit erroneously issued. Yet no one ever doubted the authority of the Secretary administratively to annul

[15] It is worth noting that, under the scheme of the Act as originally enacted, the present lease would not have been a "lease" but rather a "prospecting permit," cancellable by administrative action. Secs. 13, 14, 17, 26; 41 Stat. at 441–442, 443, 448. When the Act was amended in 1935, 49 Stat. 674, 676, "prospecting permits" became "leases," still cancellable by administrative action for breach of the terms of the grant "until the land covered by any such lease is known to contain valuable deposits of oil or gas." 49 Stat. at 678; now incorporated in 30 U.S.C. 188.

a permit granted by mistake to the wrong applicant, or on land not open for lease. Nor would it be reasonable to suppose that Congress meant to allow the Secretary to judge a breach by the permittee, while denying power to correct his own mistakes, and those of his subordinates. The answer is, of course, that Section 26 does not deal with the correction of errors; that power already existed in the general statutes governing the Secretary of the Interior. The provision ignores the obvious and proceeds to define a new authority with respect to the cancellation of a permit for causes arising after its issuance. The same principle governs Section 31 and the other forfeiture provisions of the Act.

Thus, there is every indication that in providing for judicial cancellation, Congress was dealing with violations *by the lessee*, the purpose of the specific provisions being only to add to the existing grounds for forfeiture. There is nothing in the Act, or its legislative history, to suggest that Congress meant to erect a new rule requiring judicial intervention for the correction of administrative errors in the initial transaction. The plain fact is that Congress did not even advert to that procedure. The presumption is that it meant to leave things as they were in that respect, allowing the Department of the Interior to retain power to correct its own errors in the management of public land. If the statute affects the question at all, it is by confirming the Secretary's broad authority over the mineral lands of the government and his power to promulgate regulations for the ad-

ministration of the new leasing program. Sec. 32, 41 Stat. at 450, 30 U.S.C. 189.

The power to cancel for mistakes in the issuance of a lease has been exercised repeatedly during the past forty years.[16] The reported decision on review are confined to the Tenth and District of Columbia Circuits,[17] the former holding the Secretary without power to correct an error produced by fraud, once a lease has issued, *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649 (C.A. 10), certiorari denied, 366 U.S. 936,[18] the latter, after some vacillation,[19] reaching the opposite conclusion. *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A.D.C.); *Boesche* v. *Udall*, 303 F. 2d 204 (C.A.D.C.) (this case).

C. THE ADMINISTRATIVE PRACTICE UNDER THE MINERAL LEASING ACT OF 1920 AND SUBSEQUENT AMENDMENTS CONFIRM THE AUTHORITY OF THE SECRETARY TO CANCEL LEASES ISSUED BY MISTAKE

As we have seen, nothing in the 1920 statute itself indicates a Congressional intent to limit the Secretary's general supervisory authority over the public domain.

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[16] See pp. 27–28, *infra*; Appendices B and C.

[17] A district court decision from the Ninth Circuit, *Call* v. *Richfield Oil Co.*, 101 F. Supp. 972 (S.D. Cal.), touches on the problem and seems to resolve it in favor of the Secretary.

[18] More recently, in *Henriques* v. *Gulf Oil Corp.*, 305 F. 2d 51, though it dismissed the case as moot, the Tenth Circuit indicates adherence to its earlier view.

[19] See *Bell Oil & Gas Co.* v. *Wilbur*, 50 F. 2d 1070 (C.A.D.C.), in which the court, in different circumstances, denied the Secretary's authority, and the original opinion (Pet. Br. 36–43), later withdrawn, in *Seaton* v. *Texas Company*, 256 F. 2d 718, 721 (C.A.D.C.).

The subsequent history of the Act only confirms this impression.

Almost from the inception of the mineral leasing program the Department of the Interior undertook to exercise, as to the Mineral Leasing Act, its general authority to correct errors. After noncompetitive leases replaced prospecting permits by virtue of the Act of August 21, 1935, 49 Stat. 674, the Department continued its prior course of action. The 19 published decisions and 47 unpublished decisions [19a] of the Secretary of the Interior between 1921 and 1961 listed in Appendices B and C of this brief indicate the consistent Interior policy of canceling permits [20] and leases where they had been issued by mistake, through fraud, or in violation of law.

The facts underlying those decisions vary widely. Some are close to the present case. See, *e.g., R. S. Prows,* 66 I.D. 19; *Charles D. Edmondson,* 61 I.D. 355, 365; *Iola Morrow,* A-27177 (October 10, 1955); *Alexander Leach* v. *Cornell,* A-1687 (August 13, 1921). Others are more remote, such as those involving fraud. See,

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[19a] Copies of these unpublished decisions have been filed with the Clerk and served on counsel for petitioner.

[20] Cancellation of *permits* for error or fraud is not to be distinguished from *lease* cancellations on the same grounds. As already noted, Section 26 of the original Act provided for administrative cancellation of permits only for breach of the conditions of the grant, just as Section 31 now does for non-competitive leases before the value of the land is proved. But neither provision adverts to cancellation for other causes; the Secretary's authority to cancel for error does not derive from the 1920 Act in either case. We must reject as mistaken the Secretary's occasional reliance on Section 26 in cancelling permits for causes not there specified. See *James Griffith Stephens,* M-14721 (January 27, 1926); *Wecolo Oil Company,* M-14722 (January 27, 1926).

e.g., Hill v. *Williams and Liddell,* 59 I.D. 370; *Antonio DiRocco et al.,* A–26434 (July 11, 1952). Yet they all illustrate the same underlying principle, that the erroneous issuance of a lease is an unauthorized act which must be promptly undone. See *Reay* v. *Lackie,* 60 I.D. 29; *Transco Gas & Oil Corp., et al.,* 61 I.D. 85. At all events, the fact is that the Secretary has, from the beginning, cancelled mineral leases issued by mistake in derogation of the rights of another applicant. *Alexander Leach* v. *Ernest Cornell,* A–1687 (August 13, 1921); *McCarthy* v. *Son,* A–2398 (March 4, 1922); *John A. Murray* v. *A. F. McNabb,* A–4412 (February 14, 1923); *Irvin C. Smith* v. *William R. Buttolph,* A–5129 (June 2, 1923). And that practice has been allowed to continue undisturbed.

More than a dozen times in forty years Congress has amended the Mineral Leasing Act of 1920 as it relates to oil and gas leases.[21] Yet, never once were the cancellation and forfeiture provisions changed to overturn the persisting practice of administratively cancelling permits and leases issued by mistake. The conclusion is plain that Congress did not view the Secretary's conduct as violative of the statute, or, at least, that it was content to leave matters as they were.

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[21] See Act of April 30, 1926, 44 Stat. 373; Act of July 3, 1930, 46 Stat. 1007; Act of March 4, 1931, 46 Stat. 1523; Act of Aug. 21, 1935, 49 Stat. 674; Act of Aug. 26, 1937, 50 Stat. 842; Act of Aug. 8, 1946, 60 Stat. 950; Act of June 1, 1948, 62 Stat. 285; Act of Sept. 1, 1949, 63 Stat. 682; Act of July 29, 1954, 68 Stat. 583; Act of Aug. 2, 1954, 68 Stat. 648; Act of Sept. 21, 1959, 73 Stat. 571; Act of Sept. 2, 1960, 74 Stat. 781.

Though none of the early amendments touch our question, two are perhaps worth mentioning. We have already noted that the Act of August 21, 1935, 49 Stat. 674, 676, converted "prospecting permits" on unknown geologic structures to "non-competitive leases," carrying over the provision for administrative cancellation for breach of the conditions of the grant before the land was proven. This was accomplished by adding a new paragraph to Section 17 of the Act, stipulating that such leases "shall be subject to cancelation by the Secretary of the Interior * * * upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas." 49 Stat. at p. 678. The legislative reports do not reveal anything pertinent here beyond the obvious fact that the system is being changed from permits to leases. S. Rep. No. 1158, H. Rep. No. 1747, and H. Conf. Rep. 1775, 74th Cong., 1st Sess.

The Act of August 8, 1946, 60 Stat. 950, transferred the above provision relating to cancellation of leases from Section 17, 30 U.S.C. 226, to Section 31, 30 U.S.C. 188. S. Rep. No. 1392, p. 3, 79th Cong., 2d Sess. The Senate Report explains the change as follows:

> Section 31 of the Mineral Leasing Act is amended to consolidate in that section various provisions of the act relating to termination or forfeiture of leases by default by the lessee, the substance of the existing law being retained in the amended section.

The 1946 Act also amended Section 27, 30 U.S.C. 184, which had provided that:

> Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General * * *.

The provision was changed to read:

> If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. * * *

The report of the Department of the Interior, which is printed in Senate Report No. 1392, *supra*, indicates the primary concern at the time was with the problem of forfeiture where the interest illegally owned or controlled represented only a fractional part of the lease. No change relevant to our problem was intended.

More in point is the history of an unsuccessful proposal considered by the Congress in connection with the amendment of the Mineral Leasing Act effected by the Act of September 2, 1960, 74 Stat. 781. During those debates, Congress was fully advised of the position of the Department of the Interior with respect to its authority to cancel oil or gas leases which had been issued through error or fraud, and, in deference

to the Department's protests, it expressly declined to change the Mineral Leasing Act to affect the administrative authority of the Secretary to cancel leases.

At the time, *Pan American Petroleum Corp.* v. *Pierson*, 181 F. Supp. 557 (D. Wyo.), reversed, 284 F. 2d 649 (C.A. 10), certiorari denied, 366 U.S. 936, a case involving the issue of the Secretary's authority to cancel by administrative action a lease procured by fraud, in violation of the acreage limitation of Section 27 of the Mineral Leasing Act, was pending in the courts. Against this background of controversy, several bills were introduced in the 86th Congress which either expressly, or by implication, would have seriously limited the administrative authority of the Secretary to cancel an oil and gas lease issued in error or by fraud. Among these was H.R. 10455. It would have amended Section 27 to provide expressly that "no lease, option or interest with respect to the acquisition or holding of which the Secretary alleges or charges the commission of fraud against the United States shall be canceled, forfeited, or ordered to be disposed of except in an appropriate proceeding instituted by the Attorney General in the United States District Court for the district in which the land, or some part of it, is located * * *" (Proposed Sec. 27(h)(2) as set out at pp. 24–25 of H. Rep. No. 1401, 86th Cong., 2d Sess.).

The Secretary protested very strongly against the attempt to limit his administrative authority to cancel leases. In his report to the House Committee, the

Secretary said (H. Rep. No. 1401, 86th Cong., 2d Sess., at p. 10):

> * * * subsection (h)(2) of section 27 as it would be amended by H.R. 10455 would deny the Secretary the right to cancel or forfeit a lease, option, or other interest in two situations: (1) where producing acreage or lands known to contain valuable deposits of oil or gas are concerned, or (2) where fraud against the United States is alleged in the acquisition or holding of that lease, option, or other interest. This is an important material change from the present law since the Secretary now has full authority to cancel leases, whether on producing or on nonproducing acreage, where fraud is proved in their acquisition. The present prohibition on the administrative cancellation of leases where producing acreage is involved (30 U.S.C. 188) is limited to leases which have been lawfully issued. * * *

A similar protest was filed against the Senate version of the bill. See S. Rep. No. 1549, 86th Cong., 2d Sess., p. 22.

Congress retreated. The limiting amendment was abandoned. House Report No. 1401, p. 15, indicates the congressional attitude:

> The committee gave careful consideration, as requested in the Department's report, to the provisions of subsection (h)(2) of section 27 as it would be amended by H.R. 10455 as introduced. Since the committee adopted an amendment which reverts to the present language of the Mineral Leasing Act on the point involved, it did not adopt the clarifying amend-

> ment to the language of the bill as introduced recommended by the Department. H.R. 10455, as amended, thus does not interfere with the exercise of whatever supervisory powers the Secretary of the Interior may now have over proceedings arising from the act. As noted before in this report, the extent of these powers is now in litigation.

Earlier, at page 7 of the report, the Committee had said:

> The committee recognizes that the meaning of this language is under current dispute. The plaintiffs in certain cases pending or recently pending in the U.S. District Court for the District of Wyoming have questioned the asserted authority of the Secretary of the Interior to cancel or forfeit oil and gas leases in an administrative proceeding. The committee believes that any legislation further fixing jurisdictional boundaries in this field between the judiciary and the executive should await the outcome of, and be based upon the experience gained through, the pending actions.

The upshot is that, though fully apprized of the Secretary's long-standing practice, Congress chose not to interfere. Whether or not ratification of the administrative practice can be inferred (see *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Billings* v. *Truesdell*, 321 U.S. 542, 552–553; *Brooks* v. *Dewar*, 313 U.S. 354; *United States* v. *Kennedy*, 278 F. 2d 121, 126 (C.A. 9)), Congress has at least indicated continuing acquiescence in the executive construction,

which justifies the Secretary in following the same practice until the authority is revoked. *Sioux Tribe* v. *United States*, 316 U.S. 317, 326; *United States* v. *Jackson*, 280 U.S. 183, 197; *United States* v. *Midwest Oil Co.*, 236 U.S. 459.

D. THE ADMINISTRATIVE POWER TO CANCEL A LEASE ISSUED BY MISTAKE, UPON APPEAL FROM THE SUBSEQUENT DENIAL OF A CONFLICTING APPLICANT, IS NECESSARY TO SECURE THE RIGHTS OF COMPETING APPLICANTS

As we have seen, the Secretary's power to cancel leases is essential to protect the public interest in the administration of the public domain. Thus, here, the correction gives effect to regulations designed to check the undue splitting up of tracts which would facilitate frauds, hinder the development of oil and gas resources and render supervision very burdensome.[22]

[22] The policy behind the rule is explained in *Annie Dell Wheatley*, 62 I.D. 292, at 293–294:

> The Secretary has found that the filing of offers for oil and gas leases without a minimum limitation as to acreage often leads to abuses as far as the general public is concerned, to administrative difficulties, and to the hindrance of the proper development of the oil and gas resources of the public domain. It was to protect the public from such abuses, all of which are well known to the oil industry, to lessen the administrative burden, and to remove impediments to the proper development of public lands that the regulation was adopted. As the intervener recognizes, the regulation was adopted as the result of widespread advertising by promoters that members of the public could secure 40-acre oil and gas leases for sums ranging from $50 to $100 or more. The filing fee and first year's rental on a 40-acre lease amounted to only $30. Oil and gas filings increased as much as 42 to 60 percent in some land offices as a result of the advertising. The

In addition, where, as in this case, the statutory rights of others are involved; the administrative power to correct erroneous awards serves a second purpose: it permits justice to be done between private claimants.

Under Section 17 of the Mineral Leasing Act (30 U.S.C. 226) "the person first making application for the lease who is qualified to hold a lease under [the statute] shall be entitled to a lease of such lands without competitive billing." In the case of desirable lands this is an important right, which the Department uses care to protect. If a lease is erroneously issued to one who is not qualified, or on a defective application, the first qualified applicant is in danger of losing his statutory priority. Ideally, perhaps, mistakes should be corrected *before* a lease is issued. Actually, if the right of the first qualified applicant is to be effective, the Department must have an administrative power of re-

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result was a slow down in the processing of applications not induced by the advertising, with the prospect of even greater delays as the 40-acre filings mushroomed. Moreover, as the issuance of 40-acre leases increased, so would the difficulties of an operator attempting to assemble acreage for development purposes increase. Instead of contacting one lessee for a section of land an operator might have to deal with 16 lessees scattered over the United States. The difficulties of attempting to assemble a large block of acreage under these conditions would be enormous, and would definitely impede the development of the public lands. Furthermore, not only did the 40-acre filings cause a substantial administrative burden in processing the filings but it could be anticipated that in the future, with most of the lessees being pure speculators, there would be defaults in rentals leading to substantial administrative work in attempting to clear up lease accounts and records.

vision to correct erroneous awards in derogation of that right.

In the absence of some special arrangement a local land office takes up the applications on file in chronological sequence and disposes of each. It would be virtually impossible to try to hold a formal hearing upon each of thousands of applications, giving conflicting claimants notice and the opportunity to be heard and to appeal. The manager of the local office or an assistant acts upon each application in turn. If the land is available, if the applicant is qualified, and if the application appears to conform to the regulations, a lease will issue. In due course the manager will come to each conflicting application for the same tract that was filed before the lease was issued. He may realize his own mistake. More likely, he will find that the second applicant was not the first qualified applicant and will, therefore, deny the application. The notice of denial may give the applicant his first occasion to investigate whether he was in truth the first qualified applicant, and to appeal on this ground to the Director of the Bureau of Land Management and the Secretary of the Interior. Thus, given the nature of the land office's business, the existence of some power of cancellation, at least while timely conflicting applications are pending, is essential to secure the rights of competing applicants. The importance of this consideration is shown by the fact that in practice the Secretary has not used his power to cancel where the irregularity is minor unless necessary, as in the present case, to prevent prejudice to a com-

peting applicant whose application was on file before the lease was erroneously issued. Cf. 43 C.F.R. (1962 Supp.) 221.10.

In the present case, for example, Cuccia and Conley had a conflicting application pending at the same time as petitioner's. Petitioner's application was defective, although it was filed first. When the local manager overlooked the defect and erroneously approved petitioner's application he had not yet come to the conflicting application of Cuccia and Conley. Their first knowledge that their application would be unsuccessful appears to have come when they subsequently received word that it had been denied; certainly this was the first administrative notification. For the Secretary to have refused to correct the earlier error on the ground that a lease had already issued would have resulted in defeating the prior right of Cuccia and Conley as the first qualified applicant. Only by recognition of the power to cancel could that right be effectively preserved.

E. THE EFFECT OF THE DEPARTMENT'S PROCEDURAL REGULATIONS, AS ADMINISTERED, IS TO MAKE THE ISSUANCE OF A LEASE SUBJECT TO REVIEW, AS UPON APPEAL TO A HIGHER OFFICIAL, UNTIL THE DEPARTMENT HAS RULED UPON ALL CONFLICTING APPLICATIONS FILED BEFORE THE LEASE WAS ISSUED

The regulations of the Department of the Interior and the prevailing practice recognize the foregoing practicalities. The published rules of practice, 43 C.F.R. (1962 Supp.), Part 221, expressly provide that anyone "adversely affected by a decision of [a subordinate] officer of the Bureau of Land Management

* * * shall have a right of appeal to the Director [of the Bureau]", § 221.1. The right must be exercised within 30 days of receipt of the decision complained of. § 221.2. And a further appeal from the Director to the Secretary is provided to the dissatisfied party, § 221.31, again subject to the same time limitations. § 221.32. The application of these provisions in contesting a lease award is illustrated by the history of this case. As already noted, shortly after the grant to petitioner, Cuccia and Conley, the second applicants, were notified by the local land office that their offer was rejected because of petitioner's prior offer. They were specifically advised of their right to appeal and, within the time prescribed, they appealed from the decision to the Director of the Bureau of Land Management. When the Director rendered his decision, reversing the local land Manager and ordering cancellation of the initial lease award, it was petitioner's turn to appeal to the Secretary, as he did. Only then was the administrative action in any sense final. See § 221.37.

The review provisions of the regulations and their availability to a rejected applicant would seem to make it plain that the initial award of a lease is merely tentative. Since an appeal is allowed to the unsuccessful party, the award, quite obviously, is made subject to the determination on review. Certainly, the mere fact that the lease has issued before the ultimate decision is rendered does not foreclose the argument that the Secretary's action is an exercise of the appellate power. The judicial analogue sug-

gests itself. The Secretary of the Interior no more loses jurisdiction over the decision of his subordinate which has gone into effect than does an appellate court over a judgment which has been paid, provided, in both cases, that a timely appeal has been lodged.

There is, of course, no doubt of the Secretary's right to prescribe a system of internal review for the correction of errors committed by his subordinates. As head of an executive department, the Secretary has plenary authority to promulgate regulations "for the government of his department" 5 U.S.C. 22; see also, 43 U.S.C. 1201. Certainly, this includes the power to provide for administrative appeals within the agency. Nothing is more common. See Davis, *Administrative Law*, § 8.18. And, in the Department of the Interior, review procedures with reference to grants in the public domain have been in effect since at least 1836. See *Barnard's Heirs* v. *Ashley's Heirs*, 18 How. 43, 44–45; *Johnson* v. *Towsley*, 13 Wall. 72, 81–83.

Nor is there any defect in the appellate procedure actually adopted by the Department. Whenever another party is affected by the decision, the proceedings are adversary. Cf. *Civil Aero. Bd.* v. *Delta Air Lines*, 367 U.S. 316. The appellant is required to notify his opponent, 43 C.F.R. (1962 Supp.) 221.4, 221.34, and the latter has full rights of participation. *Id.*, §§ 221.5–221.6, 221.35.

It is said, however, that the system works unfairly in the present context because the appeal is filed and decided after the lease has already issued. The claim

is that the grantee is entitled to view the delivery of the instrument as the final action of the Department. Yet, if we correctly read the regulations, it is difficult to see how the successful applicant is misled. Knowing that every subsequent applicant who filed before the lease was issued will have a right to appeal from the rejection of his offer, and that in those proceedings the competing claimant is permitted to contest the initial award, the grantee is on notice that he holds by a precarious title until the times for appeal have expired, or the appeals have failed.

It can, of course, be debated whether the ideal practice might not be to withhold issuance of the lease until final disposition of any appeals. As we have shown, that is normally impractical. But, in any event, it is peculiarly a question of internal procedure to be resolved by the Secretary. See 43 C.F.R. (1962 Supp.) 221.101. The Secretary has, in turn, made a discriminating judgment as to where the balance of convenience lies in differing contexts. Thus, in cases where the manager has rejected a *prior* application (either prior in time or one which claims a statutory preference) and proposes to grant a subsequent one, the regulations direct that issuance of the lease to the subsequent applicant be withheld until final disposition of the prior applicants' claims. 43 C.F.R. 192.42(m). In such a case, the prior claims are, in effect, accorded a presumptive validity that warrants suspension of further action until they are finally resolved. On the other hand, where the manager proposes to grant the earlier-filed ap-

plication, the regulations do *not* require that the issuance of the lease be delayed against the possibility that a later applicant may assert a defect in that application and take an appeal. There, the presumptive validity of the earlier-filed application, confirmed by the manager's initial decision, cuts the other way, and the likelihood that a subsequent applicant will be able successfully to challenge the prior application is not deemed sufficiently substantial to warrant postponement of the issuance of the lease—a presumption that has been confirmed in practice by the infrequency of successful challenges by later-filing applicants.[23] That accommodation of the competing interests—balancing the desirability of not taking action which might have to be undone against the desire to avoid needless delays in issuing leases—involves considerations not unlike those which counsel courts to grant or deny stays of judgments pending appeal. And, like the judicial analogue, whether the action should be stayed or not is a question only of the sound exercise of discretion. The Secretary's appel-

[23] There is an informal practice, not embodied in the regulations, of withholding issuance of the lease even in that context if, before the prior application has been acted upon, a subsequent applicant has brought to the manager's attention an alleged defect in the application and protested its grant. In such a case, the likelihood of a serious contest over the grant is deemed real enough to justify postponement of the issuance of the lease pending its resolution. Since, however, that procedure is not prescribed by regulations, Cuccia and Conley, the competing applicants in this case, can hardly be bound by it or have their rights foreclosed by their failure to "protest" the award to petitioner prior to the issuance of the lease.

late procedure is not defective merely because it does not always require suspension of the challenged decision pending review.

We do not suggest that the Secretary has formally conceived the practice of cancellation upon appeal by a competing applicant as a species of appellate review. Nor do we stand only upon such narrow ground. The power of the Secretary, subject to appropriate judicial review, to cancel leases for mistakes in their issuance is, as we have shown, well established both by practice and in the law governing the management of the public domain. Were it necessary, however, the cancellation *in this case* should be upheld as appellate action taken before the decision to award the lease to petitioner had become "final" under the departmental practice pursuant to published regulations.

CONCLUSION

The judgment of the court of appeals is correct and should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

FEBRUARY 1963.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 485, formerly R.S. § 441:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * * *
>
> 4. Bureau of Land Management.
>
> * * * * *
>
> 13. Public lands, including mines.

43 U.S.C. 2, formerly R.S. § 453:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. 1201, formerly R.S. § 2478:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Section 31 of the Mineral Leasing of 1920, as amended, 30 U.S.C. 188:

> Except as otherwise herein provided, any lease issued under the provisions of sections 181–184, 185–188, 189–192, 193, 194, 201, 202–209, 211–214, 223, 224–226, 226d–229a, 241, 251,

and 261–263 of this title may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of said sections, of the lease, or of the general regulations promulgated under said sections and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land. Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however,* That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made.

43 C.F.R. 192.42(d):

> * * * Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:
>
> (1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.
>
> (2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment.

43 C.F.R. 192.42(g)(1):

> Except as provided in subparagraph (2) of this paragraph, an offer will be rejected and returned to the offeror and will afford the applicant no priority if:
>
> * * * * *
>
> (ii) The total acreage * * * is less than 640 acres or the equivalent of a section and is not within the exceptions of paragraph (d) of this section.

43 C.F.R. 192.42(m):

> No lease shall be issued before final action has been taken on (1) any prior offer to lease the land, (2) any subsequent offer to lease the land that is based upon an alleged preferential right, and (3) any petition for the renewal or reinstatement of an existing or former lease on the land. If a lease is issued before final action has been taken on such an offer or petition,

it shall be canceled, after due notice to the lessee, if the offeror or petitioner is found to be qualified and entitled to receive a lease on the land.

43 C.F.R. (1962 Supp.) 221.1:

> Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management other than the Director or persons signing for the Director, shall have a right of appeal to the Director.

43 C.F.R. (1962 Supp.) 221.2(a):

> A person who wishes to appeal to the Director must file in the office of the officer who made the decision (not the office of the Director) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

43 C.F.R. (1962 Supp.) 221.4:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments or briefs on each adverse party named in the decision appealed from, in the manner prescribed in § 221.95, not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 221.98. Proof of such service as required by § 221.95 must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) within 15 days after service unless filed with the notice of appeal.

43 C.F.R. (1962 Supp.) 221.5:

> If any party served with a notice of appeal wishes to participate in the proceeding on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. If additional reasons, written arguments, or briefs are filed by the appellant, the adverse party shall have 30 days after service thereof on him within which to answer them. The answer must state the reasons why the anwerer thinks the appeal should not be sustained. Answers must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) and must be served on the appellant, in the manner prescribed in § 221.95, not later than 15 days thereafter. Proof of such service, as required by § 221.95, must be filed in the office of the Director (see address above) within 15 days after service. Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in § 221.92.

43 C.F.R. (1962 Supp.) 221.6:

> Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to a Field Commissioner of the Bureau of Land Management for such a hearing. Such a request must be made in writing and filed with the Director within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Director, and the Director may, on his own motion, refer any case to a Field Commissioner for a hearing on an issue of fact. If a hearing is ordered, the Director will

specify the issues upon which the hearing is to be held.

43 C.F.R. (1962 Supp.) 221.9:

> The Director will render a written decision in each case appealed to him. Such decisions will be served on all parties and shall be subject to an appeal to the Secretary as provided in § 221.31.

43 C.F.R. (1962 Supp.) 221.31:

> Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau in any case where the party adversely affected shall have failed to appeal from the decision of such official.

43 C.F.R. (1962 Supp.) 221.32(a):

> A person who wishes to appeal to the Secretary must file in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the Director's office within 30 days after the person taking the appeal is served with the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

43 C.F.R. (1962 Supp.) 221.34:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, writ-

ten arguments or briefs on each adverse party named in the decision appealed from, in the manner prescribed in § 221.95, not later than 15 days after filing the document. Failure to serve within the time required will subject the appeal to summary dismissal as provided in § 221.98. Proof of such service as required by § 221.95 must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) within 15 days after service unless filed with the notice of appeal.

43 C.F.R. (1962 Supp.) 221.35:

If any party served with a notice of appeal wishes to participate in the proceeding on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. If additional reasons, written arguments, or briefs are filed by the appellant, the adverse party shall have 30 days after service thereof on him within which to answer them. The answer must state the reasons why the answerer thinks the appeal should not be sustained. Answers must be filed in the office of the Secretary (address: Secretary of the Interior, Washington 25, D.C.) and must be served on the appellant, in the manner prescribed in § 221.95, not later than 15 days thereafter. Proof of such service, as required by § 221.95, must be filed in the office of the Secretary (see address above) within 15 days after service. Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in § 221.92.

43 C.F.R. (1962 Supp.) 221.37:

No appeal will lie in the Department from a decision of the Secretary.

APPENDIX B

PUBLISHED DECISIONS OF THE SECRETARY OF THE INTERIOR CANCELLING OIL AND GAS LEASES AND PERMITS ISSUED UNDER THE MINERAL LEASING ACT OF 1920 FOR MISTAKE, INADVERTENCE, FRAUD, OR OTHER REASONS ARISING PRIOR TO THEIR ISSUANCE

1. *J. Penrod Toles*, 68 I.D. 285 (1961).
2. *Waring Bradley, James M. Snowden*, 67 I.D. 241 (1960).
3. *Lynn Nelson, Uranium King Corporation*, 66 I.D. 14 (1959).
4. *R. S. Prows*, 66 I.D. 19 (1959).
5. *L. E. Grammer*, 66 I.D. 201 (1959).
6. *Malcolm C. Petrie*, 66 I.D. 288 (1959).
7. *Duncan Miller, Louise Cuccia*, 66 I.D. 388 (1959).
8. *Marion F. Jensen et al., Elden F. Keith et al.*, 63 I.D. 71 (1956).
9. *R. B. Whitaker et al.*, 63 I.D. 124 (1956).
10. *Arnold R. Gilbert*, 63 I.D. 328 (1956).
11. *B. E. Van Arsdale*, 62 I.D. 475 (1955).
12. *The Texas Company et al.*, 61 I.D. 367 (1954).
13. *Charles D. Edmonson et al.*, 61 I.D. 355 (1954).
14. *Transco Gas & Oil Corp. et al.*, 61 I.D. 85 (1952).
15. *Bettie H. Reid et al.*, 61 I.D. 1 (1952).
16. *Sidney J. Armstrong, G. C. Dunford*, 60 I.D. 425 (1950).
17. *Reay* v. *Lackie*, 60 I.D. 29 (1947).
18. *Hill* v. *Williams and Liddell*, 59 I.D. 370 (1947).
19. *Moon* v. *Woodrow*, 51 I.D. 118 (1925).

APPENDIX C

Representative Group of Unpublished Decisions of the Secretary of the Interior During Period 1921–1961 Canceling Oil and Gas Leases and Permits Issued Under the Mineral Leasing Act of 1920 for Mistake, Inadvertence, Fraud, or Other Reason Arising Prior to Their Issuance

1. *West Central Corporation*, A–28523 (February 2, 1961). Oil and gas lease, Anchorage 032625, cancelled because the lease was issued on the basis of a defective offer in violation of the statutory preference right of the first qualified applicant for the land.

2. *Gaylord O. Mickelson*, A–27952 (Supp.) (September 26, 1960). Oil and gas leases Colorado 017773 and 017776 cancelled in their entirety and Colorado 017777 cancelled in part as having issued for lands included in outstanding oil and gas leases.

3. *Andreas J. Wikan*, A–28356 (July 18, 1960). Oil and gas lease Anchorage 033656, cancelled in part to the extent of conflict with a prior lease.

4. *E. B. Todhunter, Victoria L. Cuccia*, A–28197 May 23, 1960). Oil and gas lease New Mexico 011398, cancelled as having issued in violation of the statutory preference right of the first qualified applicant for the land.

5. *Albert Stevenson, Alexander S. Dunham*, A–27953 (June 30, 1959). Oil and gas lease Anchorage 036150, cancelled as having issued pursuant to a defective offer in violation of the statutory preference right of the first qualified applicant for the land.

6. *Eugenia Bate, et al.*, A–27861 (March 3, 1959). Oil and gas lease New Mexico 023799, cancelled as

having issued in violation of the statutory preference right of the first qualified applicant for the land.

7. *Union Oil Company of California* v. *Western Drilling and Producing Co. et al.*, A–27588 (July 14, 1958). Oil and gas leases Los Angeles 037880–B and Los Angeles 056758, cancelled to the extent of conflict with valid mining claims located on the land.

8. *John E. Miles*, A–27577 (June 12, 1958). Oil and gas lease New Mexico 018377, cancelled as having issued on land owned by the State of New Mexico.

9. *Iola Morrow*, A–27177 (October 10, 1955). Oil and gas lease Anchorage 028225, cancelled as having issued in violation of the statutory preference right of the first qualified applicant for the land.

10. *R. L. Grady*, A–26903 (August 31, 1954). Oil and gas lease BLM–A 021645, cancelled as having issued in violation of the statutory preference right of the first qualified applicant for the land.

11. *Ethel T. Morgan, Katherine T. Meagher*, A–26962 (May 25, 1954). Oil and gas lease Utah 04260, cancelled as having issued in violation of the preference right granted to another by section 29 of the Mineral Leasing Act.

12. *Eugene Robert Massow*, A–26524 (December 8, 1952). Oil and gas lease Los Angeles 081612, cancelled because after the offer was filed the land was withdrawn by the Secretary of the Interior for the use of the Air Force.

13. *Wm. Wostenberg*, A–26450 (September 5, 1952). Noncompetitive oil and gas lease, Wyoming 04552, cancelled in part for having issued on land known to be situated within the known geological structure of a producing oil well before the lease offer was filed.

14. *Antonio DiRocco et al.*, A–26434 (July 11, 1952). Oil and gas leases Salt Lake City 01975–

01980, incl., 01982, 02002, 02884–02886, incl., 02346, 02369–02371, incl., cancelled because the leases were fraudulently obtained.

15. *L. N. Hagood,* A–26226 (October 5, 1951). Oil and gas lease Sacramento 037518, cancelled because issued on land covered by an outstanding lease.

16. *J. U. Falke,* A–25871 (August 16, 1950). Oil and gas lease Las Cruces 065350, cancelled in part as to the conflict with a desert land entry on which final certificate had issued with no reservation of oil and gas to the United States.

17. *Davidson Hill,* A–25673 (July 22, 1949). Oil and gas lease Pueblo 059025, cancelled in part as to land which had previously been patented without a reservation of the oil and gas deposits to the United States.

18. *Marie J. Anderson,* A–24663 (August 12, 1947). Oil and gas lease Santa Fe 077542, cancelled because the land had previously been withdrawn by a departmental order.

19. *Roy M. Myers* v. *Carl VanWy,* A–21232 (April 5, 1938). Oil and gas prospecting permit Sacramento 021217, cancelled when it was discovered that there were two outstanding permits on the same land. Motion for rehearing denied, A–21232 (April 17, 1939).

20. *Fenelon Boesche,* A–21230 (February 21, 1938). Oil and gas lease GLO 06274, cancelled as the Government had no title or interest in the land when the lease issued.

21. *Glen G. Jones,* A–21016 (August 30, 1937). Oil and gas prospecting permit Pueblo 056311, cancelled in part because the permit was issued on land covered by a reservoir site.

22. *Joseph Francis Marias,* A–20952 (August 17, 1937). Oil and gas prospecting permit, Sacramento

027373, cancelled because the United States had no right or interest in the land.

23. *John W. Flint,* A–20506 (December 31, 1936). Oil and gas prospecting permit Los Angeles 051973, cancelled in part as having issued on land covered by a homestead entry upon which final proof had been filed and was without oil or gas reservation.

24. *Robert Hawxhurst, Jr.,* A–17613 (November 11, 1933). Oil and gas permit Sacramento 027179, cancelled because it issued on land which was within one mile of a naval petroleum reserve and this land had been withdrawn by the Secretary of the Interior from oil and gas prospecting. Motion for rehearing denied A–17613 (March 15, 1934).

25. *Frank Drake et al.* v. *North K. Simmons,* A–16885 (October 28, 1932). Oil and gas permit, Cheyenne 044173, cancelled in part because when it was reinstated it conflicted in part with an outstanding oil and gas permit.

26. *H. P. Saunders* v. *James T. Norman,* A–14464 (March 3, 1930). Oil and gas permit Las Cruces 027575, cancelled in part for having issued on land covered by a homestead entry on which final proof had been filed and was without a reservation of oil and gas to the United States.

27. *H. L. Pankurst* v. *Winfred J. May,* A–14248 (November 14, 1929). Oil and gas permit Las Cruces 032591, cancelled in part as to land which had previously been patented without a reservation of the oil and gas to the United States.

28. *F. O. Darby* v. *State of Louisiana,* A–12177 (February 21, 1929). Oil and gas permit Baton Rouge 011418, cancelled because the land was determined to be within the purview of the swamp-land grants of March 2, 1849 (9 Stat. 352) and September 28, 1850 (9 Stat. 519).

29. *Roy Whitten, M. B. Stevens,* A–11980 (January 30, 1929). Oil and gas permit Las Cruces 030556, cancelled as having issued on land in a homestead entry on which a patent was to issue without a reservation of oil and gas to the United States. Motion for rehearing denied, A–11980 (August 21, 1929).

30. *Charles E. Mills* v. *Leroy C. Gould, United States, Intervener,* A–11895 (September 5, 1928). Oil and gas permit, Los Angeles 041179, cancelled in part by reason of conflict with valid placer mining claims.

31. *Jacob Tornes,* A–11767 (July 3, 1928). Oil and gas permit Cheyenne 045173, cancelled in part because the land involved was not of a sufficient width to permit of drilling thereon in accordance with the provisions of section 16 of the Mineral Leasing Act. Petition for supervisory authority denied, A–11767 (October 27, 1928).

32. *Christina J. Ashe* v. *Clarence Dunn Hyde,* A–9587 (August 13, 1926). Oil and gas permit Visalia 014757, cancelled as having issued in violation of the preference right of another to a permit under section 20 of the Mineral Leasing Act.

33. *Wecolo Oil Company, Assignee of Valdo F. Wilson,* M–14722 (January 27, 1926). Oil and gas permit Denver 028815, cancelled on account of conflict with a grant of a right-of-way for a reservoir under the act of March 3, 1891 (26 Stat. 1095, 1101).

34. *James Griffith Stephens,* M–14721 (January 27, 1926). Oil and gas permit Denver 028587, cancelled on account of conflict with a grant of a right-of-way for a reservoir under the act of March 3, 1891 (26 Stat. 1095).

35. *C. B. Callahan, assignee of Ernest U. Schroeter,* A–8095 (July 31, 1925). Oil and gas permit Visalia

09213, cancelled in part as to land within one-mile of Naval Petroleum Reserve No. 1 which had been withdrawn by departmental order from oil and gas prospecting.

36. *Toribie Martinez* v. *Jay Turley*, A–7995 (June 10, 1925). Oil and gas permit Santa Fe 047818, cancelled in part as having issued on land covered by a settlement claim upon which an application for entry under the enlarged homestead act had been filed and the land was classified as being without prospective value for oil and gas.

37. *Bethlehem Exploration Interests, assignee* v. *Mary P. Dempsey*, A–6085 (February 19, 1924). Oil and gas permit Salt Lake City 032209, cancelled as having issued in violation of the rights of a prior applicant.

38. *Bertha M. Rosseau et al.* v. *Western Oil and Gas Co.*, A–5421 (August 2, 1923). Oil and gas permit Lander 011791, cancelled in part as to conflict with a valid mining claim upon which application for patent had been filed.

39. *Irvin C. Smith* v. *William Buttolph*, A–5129 (June 2, 1923). Oil and gas permit Glasgow 057420, cancelled because in conflict with an application by one entitled to a preference right to a permit under section 20 of the Mineral Leasing Act.

40. *Emil H. Selbach*, A–4318 (March 19, 1923). Oil and gas permit Evanston 08136, cancelled for land which State of Wyoming had applied for a patent to under the so-called Carey Act of August 18, 1894 (28 Stat. 372, 422) and the patent was to issue to the State without a reservation of oil and gas to the United States.

41. *John A. Murray* v. *A. F. McNabb*, A–4412 (February 14, 1923). Oil and gas permit Douglas

027144, cancelled as having issued in violation of the rights of another applicant who was entitled under section 13 of the Mineral Leasing Act to a preference right to a permit.

42. *Kretni Development Co.* v. *Benjamin J. Noland,* A–4358 (February 10, 1923). Oil and gas permit, Cheyenne 029918, cancelled as having issued on land covered by a valid placer mining claim.

43. *Charles A. Stewart,* A–4102 (November 14, 1922). Oil and gas permit Newcastle 025259, cancelled in part as to land which was included in a prior permit.

44. *Luther E. Pyle,* A–3078 (May 6, 1922). Oil and gas permit Newcastle 026246, cancelled in part as to conflict with homestead entries which were without reservations of oil and gas to the United States.

45. *Joseph R. McCarthy* v. *Charles A. Son,* A–2398 (March 4, 1922). Oil and gas permit Los Angeles 032836, cancelled as having issued in violation of rights of a prior applicant for the land.

46. *Joseph S. Glass,* A–2124 (February 10, 1922). Oil and gas permit Salt Lake City 026293, cancelled in part as to land for which the applicant did not intend to apply for.

47. *Alexander Leach v. Ernest Cornell,* A–1687 (August 13, 1921). Oil and gas permit Miles City 048833, cancelled in part as to land upon which an entryman had filed a preference right application for a permit under section 20 of the Mineral Leasing Act.

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REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, Administrator of the Estate of F.W.C. BOESCHE, Deceased,
Petitioner

v.

STEWART L. UDALL, Secretary of the Interior,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

LEWIS E. HOFFMAN
711—14th Street, N.W.
Washington 5, D.C.

LEON BENEZRA
810—18th Street, N.W.
Washington 6, D.C.
Counsel for Petitioner

February, 1963

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In his brief the Secretary of the Interior asserts that he has the administrative power to cancel a lease independently of the Mineral Leasing Act (Sec. Br., p. 9). The Secretary implies this authority from Section 441 of the Revised Statutes of 1875, 5 U.S.C. 485 which charges the Secretary of the Interior with the supervision of public business relating to the public land, including mines; from Section 2478 of the Revised Statutes 43 U.S.C. 1201 authorizing the Secretary to "enforce and carry into execution by appropriate regulations, every part of the provisions of * * * (the title dealing with the

public lands) not otherwise provided for.", and from a number of decisions of this court which he cites. (Sec. Br., pp. 10, 11, 12).

Because of the heavy reliance of the Secretary on the cases cited by him, let us examine them to determine whether or not they support the Secretary's asserted authority to cancel leases. A careful reading of these cases will reveal that this court sustained the Secretary's authority to determine whether mining claims were mineral in character prior to issuance of a patent, *Best* v. *Humboldt Placer Mining Co.*, No. 52, this term, decided January 14, 1963, *Cameron* v. *United States*, 252 U.S. 450 (1920); to cancel a fraudulent preemption entry prior to issuance of patent; *Harkness & Wife* v. *Underhill*, 1 Black 316, 66 U.S. 316 (1861); *Orchard* v. *Alexander*, 157 U.S. 372 (1894); to cancel a homestead entry prior to issuance of patent; *Lee* v. *Johnson*, 116 U.S. 48 (1885); to revise a selection list previously approved by the Surveyor General and Commissioner of the General Land Office where no patent had issued; *Knight* v. *United States Land Association*, 142 U.S. 161 (1891); to annul a fraudulent timber land entry where no patent had issued; *Hawley* v. *Diller*, 178 U.S. 476 (1900); to reject a lieu land selection where no patent had issued; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316 (1902).

It is obvious from the foregoing that these cases cited by the Secretary provide no support whatever for his asserted implied authority to cancel leases administratively. On the contrary, the lines of jurisdictional demarcation between the Secretary and the judiciary established by this court in the above-cited cases and the "patent" cases cited and reviewed on pages 23-26 of petitioner's main brief, clearly prohibit Secretarial cancellation of a lease which has been issued

Thus, in *Hawley* .. *Diller*, 178 U.S. 476, 490, this court stated:

> "* * * the Land Department has control over disposition of the public lands until patent has been issued therefor and accepted by the patentee * * *"

and in *Brown* v. *Hitchcock*, 173 U.S. 473, 478 this court said:

> "But what we do affirm and reiterate is that power vested in the Department to determine all questions of equities, right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when legal title has passed from the government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on."
>
> "Of course, if the land officers are induced by false proof to issue a patent for mineral leases . . . or if they issue such a patent fraudulently or through a mere inadvertance, a bill in equity, on the part of the government, will be to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him. * * *"

Moreover, in expressing the view that after title had passed from the government, and the question became a matter of private right requiring the judgment of a court, this court emphasized that the ends of justice would thus be best served when it stated in *Johnson* v. *Towsley*, 80 U.S. 72, 87:

> "And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and a sound administration of the law."

The Secretary in his brief attempts to blunt the applicability to leases of the principles pronounced by the

"patent" cases, by disparaging the oil and gas lease when he states at pps. 17 and 18 of his brief:

> "The federal mineral lease very plainly does not give the lessee anything approaching the full ownership of a fee patent . . . At all events, the issuance of a lease under the 1920 Act, unlike the granting of a patent, does not sever the government's connection with the land, or end its interest in the property affected."

The Secretary's assertion in this regard is without merit and contrary to the Mineral Leasing Act and the terms of the lease itself.

Section 17 of the Mineral Leasing Act, as amended, (30 U.S.C. 223) provides in pertinent part:

> "Leases issued under this section shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities."

The lease issued to petitioner, and in fact all leases issued by the Land Department contain in Section 1 thereof, in part, the following:

> "Section 1. *Rights of lessee.*—The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations or other structures necessary to the full enjoyment thereof for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities . . ."

Thus, for a period of five years and, so long thereafter as oil and gas is produced in paying quantities, Section 17 of the Act and the terms of the lease itself conveyed to the petitioner the legal title, and full enjoyment of the leasehold and the "exclusive right and privilege to drill

for, mine, extract, remove and dispose of all the oil and gas deposits."

The Secretary in his reply brief contends that there is a difference insofar as the rights of a grantee is concerned between a grant in fee and one for a term of years. While there may be a distinction between the respective estates, there is no legal difference respecting the proprietary rights that attach to the grantee in a leasehold estate for years as compared with an estate in fee.

The Secretary asserts at page 28 of his brief:

> "At all events, the fact is that the Secretary has from the very beginning (of the Mineral Leasing Act of 1920), cancelled mineral leases issued by mistake in derogation of the rights of another applicant. *Alexander Leach* v. *Ernest Cornell*, A-1687 (August 13, 1921). *McCarthy* v. *Son*, A-2398 (March 4, 1922); *John A. Murray* v. *A.F. McNabb*, (February 14, 1923); *Irvin C. Smith* v. *William R. Buttolph*, A-5129 (June 2, 1923), and that practice has been allowed to continue undisturbed."

It is noteworthy, that the administrative decisions cited above by the government to support its contention that the administrative practice has been to annul leases from the very beginning of the Mineral Leasing Act are decisions cancelling oil and gas permits *only*, not leases. This fact can be readily verified by turning to Appendix "C" of the Secretary's brief where the administrative decisions cited above by the Secretary are numbered respectively in order of their appearance in the above citations as numbers 47 (p. 57), 45 (p. 57), 41 (p. 56), 39 (p. 56). As petitioner points out in his main brief at p. 14, under section 26 of the Mineral Leasing Act of 1920, Congress expressly authorized the Secretary to cancel oil and gas permits. Consequently, secretarial decisions which cancel oil and gas permits, as expressly authorized under Section 26 of the Act, fail to show an administrative practice "of cancelling leases." As a matter of fact, the most

casual reading of the synopses of the unpublished decisions of the Secretary, appearing in Appendix "C" of his brief, pages 51-57, reveals that prior to 1938 the only Secretarial cancellations were of oil and gas permits only. The earliest Secretarial cancellation of an oil and gas lease occurred on February 21, 1938 more than 18 years after enactment of the Mineral Leasing Act, in the case of Fenelon Boesche, A-21230 [1] (Sec. Br., p. 53) and here as the Secretary himself points out in the synopsis at p. 53 of his brief, the lease was "cancelled as the government had no title or interest in the land when the lease issued." Since there is no question of the government's title in the instant case, the 1938 Boesche decision can hardly serve as precedent for this case. If we examine the published decisions of the Secretary referred to in Appendix "B", p. 50 of his brief, the earliest reference in point of time is the case of *Moon* v. *Woodrow*, 51 I.D. 118 (1925). A casual reading of this case will reveal that this involved Secretarial cancellation of an oil and gas permit, not a lease. Further examination of the Secretary's Appendices B and C, pp. 50-57, shows that the next administrative cancellation of an oil and gas lease after the 1938 case of Fenelon Boesche, A-21230, occurred in 1947 in *Hill* v. *Williams and Liddell*, 59 I.D. 370 (1947) see p. 50 of the Secretary's brief. This is hardly the consistent administrative practice of administrative cancellation of oil and gas leases "from the very beginning of the Mineral Leasing Act of 1920" which the Secretary tries to establish with such great effort in his brief.

As a matter of fact, the claim of Secretarial power to cancel leases, first made in 1938 in the Boesche case, A-21230, supra, represented a complete reversal in Departmental policy. For, from the inception of the leasing program in 1920, until that time, the government had

[1] This is an earlier case not involved in this litigation.

taken the position that cancellation of leases was permissible only through judicial proceedings. The Department's position in this regard was stated in *Melish Consolidated Placer Mining Co.* v. *Testerman et al.*, 53 I.D. 205, 207, as follows: "The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts. (Sec. 31, Act of February 25, 1920)". See petitioner's main brief pp. 17 and 18.

The Secretary's brief pp. 37-42, discloses that it is established Departmental policy when there are conflicting applicants for an oil and gas lease to have the Land Manager of the Land Office determine whether the first applicant is qualified, and upon making that determination, issue a lease to him. After issuing the lease to the first applicant, the Manager then rejects the oil and gas application of the second applicant subject to the right of appeal. This is precisely what happened in the instant case. The Manager made a determination that petitioner Boesche was the first qualified applicant and a lease was issued to him on December 1, 1957. Thereafter, by decision dated January 24, 1958, the application of the second-applicant, Cuccia-Conley was rejected by the Manager subject to the right of appeal.

The Secretary at p. 40 of his brief, concedes that:

> "It can, of course, be disputed whether the ideal practice might not be to withhold issuance of the lease until final disposition of any appeals . . . but, in any event, it is peculiarly a question of internal procedure to be resolved by the Secretary."

The Secretary at p. 41 of his brief supports this course of action in part on the ground that after the lease has been issued by the Manager—

> "* * * the liklihood that a subsequent applicant will be able successfully to challenge the prior application is not deemed sufficiently substantial to warrant postponement of the issuance of the lease—a

> presumption that has been confirmed in practice by the infrequency of successful challenges by later-filing applicants."

The Secretary further indicates that this procedure has been adopted by the Department after "balancing the desirability of not taking action which might have to be undone against the desire to avoid needless delays in issuing leases . . ."

The Secretary delicately refrains from disclosing the principal reason why issuance of leases are not deferred pending disposition of conflicting applications on appeal. This reason, however, was given to the court below on page 20 of the Secretary's "Response to (Appellant's) Supplemental Memorandum" as follows:

> "The alternative would be . . . to withhold lease issuances until all possible administrative appeals to the Secretary in Washington had been exhausted. The evils to this alternative are many, one of them being the huge loss of Federal revenue from lease rentals for extended periods, some times many years, while numerous applicants exhaust their administrative remedies."

It is thus apparent that the principal reason for the established Departmental procedure of having the Manager issue the lease first, is that immediately, upon its issuance, the lessee's annual rental commences.

The Secretary claims, that the grantee who has thus been issued a lease can hardly complain because he is aware of the Department's procedures and he is on notice that, in the words of the Secretary, the "lease is merely tentative" (Sec. Br., p. 38) and that "he holds by a precarious title until the times for appeal have expired, or the appeals have failed." (Sec. Br., p. 40)

In the instant case, the lease was issued to Boesche, December 1, 1957 and the Secretary on appeal from the later-filing applicants held petitioner's lease for cancel-

lation on August 5, 1959, one year, eight months and 5 days after issuance of the lease. During this period Boesche had paid rentals for two of the 5 years of the primary term prescribed by Section 17 of the Mineral Leasing Act.

But if the issuance of the lease to Boesche had been sustained by the Secretary, as the Secretary claims is the result in most cases, Boesche for the first year, eight months and 5 days would have had a "precarious" and "tentative" lease with which nothing could be done. Does this mean that if his lease had been sustained by the Secretary his rental would have been reduced for the period of almost two years that his rights and benefits under the lease were deferred? Not at all. The grantee whose lease is being challenged and whose rights are deferred must pay for a full 5 year term although he receives in practice a term a good deal less than the 5 year term made mandatory by the Act. If Boesche's lease had been sustained by the Secretary his primary term would have been about 3 and one-third years for which he would have had to pay 5 year's rental. Thus, under the Department's procedure, the grantee whose lease has been sustained on appeal, but whose use has been postponed during the appeal interval, has in effect received a primary term of considerably less than the 5 years specified by the Act. But yet he must pay for a primary five-year term, though it has been substantially curtailed.

The startling aspect of this state of events is that the primary purpose for the Department's policy of having the Manager issue the lease first, is precisely for the purpose of collecting rentals immediately even though the benefits of the lease are denied the lessee pending the Department's so-called appellate review.

Aside from the question of the morality of collecting rentals from lessees while denying them the benefits and rights of the lease which are the consideration for the

rental payments, the Department's procedure violates Section 17 of the Mineral Leasing Act which provides that:

> "Leases issued under this section shall be for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities."

The statute says nothing about "tentative" and "precarious" leases resulting from the Secretary's procedures. Moreover, the curtailed primary terms which result from the Secretary's "appellate" procedures even if the issued lease is sustained, does not constitute the primary term of five years which Section 17 of the Mineral Leasing Act makes mandatory. The Secretary has no authority implied, or otherwise, to issue a lease for less than the primary term of 5 years, and in effect this is precisely what the Secretary does in all instances when, on appeal, he finally sustains the lease which has been issued by the Manager of a Land office.

The principles pronounced by this court in *Burke* v. *Southern Pacific R.R. Co.*, 234 U.S. 669, 698, 701, 709, (1913) requiring certainty of title in a patent issued by the government, are equally applicable to a lease. In that case this court stated:

> "A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant (patent) itself whether anything is granted or not, and, if anything be granted, what it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, than I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."
>
> "* * * the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those

of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and those rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of the officers. Diffeback v. Hawke, 115 U.S. 392, 406 . . .

"Lastly, it is urged that the railroad company accepted the patent with the mineral-land exception therein and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it or at least estopped to deny its validity. * * * The terms of the patent whereby the government transfers its title to public land are not open to negotiation or agreement. One patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement on the subject. They are not principals but agents of the law, and must heed only its will. *Diffeback* v. *Hawke*, 115 U.S. 392, 406; *Shaw* v. *Kellog*, 170 U.S. 312, 337, 343. Nor can they indirectly give effect to what is unauthorized when done directly . . . They cannot alter the effect which the law gives to a patent while it is outstanding."

The uncertainties and detrimental consequences resulting from the Secretary's asserted right to cancel leases administratively, and the self-styled "tentative" and "precarious" leases issued by the Department seriously impairs the practical operation of the Mineral Leasing Act. For as Judge Breitenstein stated in *Pan American Petroleum Corp.* v. *Ed Pierson*, 284 F. 2d 649 (1960):

"If there may be administrative cancellation of an oil and gas lease . . . the practical operation of the Mineral Leasing Act is seriously impaired. It is common knowledge that exploration for oil and gas

> is costly. The drilling of wells requires substantial financial risks and the expense of putting those wells on production and of marketing the product is burdensome. If continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed." (See p. 32 of petitioner's main brief).

The question before the court comes in this setting. Congress by a 1935 amendment to the Act,[2] and a later 1946 amendment[3] of Section 31 of the Mineral Leasing Act expressly provided that the Secretary may administratively cancel leases where there has been a violation by the lessee of the terms of the lease. Otherwise, Section 31 of the Act provides that the cancellation of an oil and gas lease is to be accomplished by judicial proceedings in an action filed in the United States District Court where the land or any part thereof is located.

The express power thus vested by congress in the Secretary in 1935 to cancel leases administratively when there has been a violation by the lessee of the terms of the lease, is the only administrative power to cancel an outstanding lease which is contained in the Act. And it is significant that this single grant by Congress of administrative power to cancel a lease is a narrow and limited power expressly restricted by clear and unambiguous language.

If the Secretary has the power to cancel a lease, apart from the provisions of the Mineral Leasing Act, the 1935 and 1946 amendments to the Mineral Leasing Act, wherein the Congress conferred on the Secretary a limited power to cancel leases, are superfluous and meaningless.

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[2] Act of Aug. 21, 1935, 49 Stat. 674.

[3] Act of Aug. 8, 1946, sec. 9, 60 Stat. 956, 30 U.S.C. 188.

The Secretary's claim that his authority to cancel leases pre-exists the Mineral Leasing Act, and is not at all effected by the limitations on such authority contained in that Act, cannot be sustained in view of this court's holding in *Youngstown* v. *Sawyer*, 343 U.S. 579 (1952). For as this court stated, through Mr. Justice Frankfurter in his concurring opinion in that case:

> "In any event nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice.
>
> "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of (cancellation) to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between . . . (Executive) and Congress." (Parenthetical material supplied).

CONCLUSION

For these reasons as well as those set out in our main brief, it is respectfully submitted that the Judgment of the court below should be reversed.

Respectfully submitted,

LEWIS E. HOFFMAN
Suite 404
711—14th Street, N.W.
Washington 5, D.C.

LEON BENEZRA
810—18th Street, N.W.
Washington 6, D.C.

Counsel for Petitioner